Docket for 03-44

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No. 03-44 Status: ARGUED
Title: Basim Omar Sabri, Petitioner
v.
United States
Docketed: July 8, 2003
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (02-1561)
Decision Date: April 7, 2003

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 2 2003	Petition for writ of certiorari filed. (Response due August 7, 2003)
Jul 31 2003	Order extending time to file response to petition to and including September 5, 2003.
Sep 5 2003	Brief of respondent United States in opposition filed.
Sep 5 2003	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 12 2003	Reply of petitioner Basim Omar Sabri filed.
Sep 17 2003	DISTRIBUTED for Conference of October 10, 2003.
Oct 14 2003	Petition GRANTED.
Nov 25 2003	Joint appendix filed.
Nov 25 2003	Brief of petitioner Basim Omar Sabri filed.
Nov 26 2003	Brief amicus curiae of Cato Institute filed.
Nov 28 2003	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 10 2003	SET FOR ARGUMENT Wednesday March 3, 2004.
Dec 17 2003	CIRCULATED.
Dec 18 2003	Extension of time within which to file respondent's brief on the merits to and including January 13, 2004.
Jan 13 2004	Brief of respondent United States filed. (Distributed)
Jan 16 2004	Record received from the U.S. Court of Appeals for the Eighth Circuit. (1 envelope)
Feb 11 2004	Record received from the U.S.D.C. for the District of Minnesota. (1 box)
Feb 17 2004	Reply of petitioner Basim Omar Sabri filed. (Distributed)
Mar 3 2004	Argued. For petitioner: Andrew S. Birrell, Minneapolis, Minn. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
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(1)

03-44

No.

In the Supreme Court of the United States

Basim Omar Sabri,

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 18 U.S.C. § 666 criminalize acts of bribery lacking a nexus to a federal interest and, if so, is the statute in that respect a constitutional exercise of Congress's powers?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Basim Omar Sabri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 326 F.3d 937 (8th Cir. 2003). (Pet. App. A-1) The decision of the District Court is reported at 183 F.Supp. 2d 1145 (D.Minn 2002). (Pet. App. A-37)

JURISDICTION

Jurisdiction to review on a writ of certiorari the opinion in question is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Spending Clause of Article 1, Section 8 of the United States Constitution provides "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

2. The Necessary and Proper Clause of Article 1, Section 8, cl. 18 of the United States Constitution provides "[t]he Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution" all the powers vested in the Government of the United States.

3. 18 U.S.C. § 666 (2000) states:

(a) Whoever, if the circumstance described in subsection (b) of this section exists-

....

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

STATEMENT

This case presents a recurring question of fundamental importance to the relationship between the states and the federal government which this Court previously left open and which has intractably divided the courts of appeals. The United States charged petitioner Basim Omar Sabri with bribery under 18 U.S.C. § 666. The court of appeals held that the government need not prove that the acts of bribery implicated any federal program. Rather, the court of appeals deemed it sufficient that the supposed target of the alleged bribe was a member of the Minneapolis City Council, an entity that – like essentially every state and local governmental entity in the nation – receives federal funding.

The district court dismissed the indictment on the ground that the charges exceeded Congress's powers. Pet.

App. A-37-A-62. A divided panel of the Eighth Circuit reversed. *Id.* A-1-A-36. The court of appeals – agreeing with the Fourth, Fifth, and Sixth Circuits but expressly rejecting the contrary view of the Second and Third Circuits – held that the statute neither requires the government to allege a nexus between the alleged bribe and any federal program nor exceeds Congress's powers. *Id.* A-13-14, A-28.

1. The general federal bribery statute, 18 U.S.C. § 666, is entitled, "Theft or bribery concerning programs that receive federal funds." As applicable to this case, Section 666 makes it a crime to "corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward an agent of" a local government "in connection with any business, transaction, or series of transactions" of such government.

Minnesota (like every state) similarly proscribes bribery. See, *e.g.*, Minn. Stat. § 609.42.

2. Petitioner is a Minneapolis property developer and real estate developer. Pet. App. A-64. During 2001, petitioner pursued a revitalization project for Minneapolis's Eighth Ward that proposed the construction of a new hotel, as well as various other new commercial construction.

In August 2001, the federal government charged petitioner with supposedly bribing Brian Herron, who was then the representative of the Eighth Ward and a member of the Board of Commissioners overseeing the Minneapolis Community Development Agency ("MCDA"). Specifically, the three-count indictment alleges (and petitioner denies) that, in July 2001, petitioner corruptly sought Herron's assistance with respect to the revitalization project in securing regulatory approvals, in negotiating with private business owners, and in obtaining development grants. See Pet. App. A-63-A-64 (reproducing the indictment). The indictment nowhere explicitly alleges a nexus between the alleged bribery and any federal program. Indeed, the first two counts merely rest on the fact that

Herron "was an agent of the City of Minneapolis and the MCDA" *Id.* A-64-A-65.

3. The district court granted petitioner's motion to dismiss the indictment. Pet. App. A-37-A-62. The court agreed with the government that, as a statutory matter, Section 666 does not require the indictment to allege a relationship between the bribe and any federally funded program. *Id.* A-41. The court expressly rejected the contrary holdings of the Second and Third Circuits: "This Court is not persuaded by these two appellate court decisions, which read a 'connection' requirement into the essential elements of a charge under § 666." *Id.* A-52. Because "the statute does not require proof of such a connection in order for the government to establish that a crime, as defined in § 666, has been committed," the district court deemed "irrelevant" the government's assertion that, notwithstanding the absence of any allegation of a nexus to federal funds in the indictment, it supposedly could produce evidence that "could establish a connection between the bribes allegedly offered by Sabri and the expenditure of federal funds." *Id.* A-53 n.9.

The district court next agreed with petitioner that the statute is unconstitutional because, without any direct nexus between the alleged criminal conduct and any federal expenditures or other federal interests, it exceeds Congress's power under the Spending Clause. The court explained that "Section 666 is plainly distinguishable from other criminal statutes containing an 'express jurisdictional element'; section 666(b) does not directly link a defendant's wrongdoing to the subject over which Congress has power – the expenditure of federal funds." Pet. App. A-55. Nor could the statute be sustained as a "condition" on the receipt of federal funds: it does not "condition a state or local government, or government agency's, receipt of federal funds"; nor does it even "apply to the recipient government or organization; it applies to the 'agents' of the recipient and private parties." *Id.*

4. On the government's appeal, a divided panel of the Eighth Circuit reversed. Pet. App. A1-A-36.

a. The panel agreed with the district court that Section 666 does not require the government to allege and prove a nexus between the alleged bribery and a federal interest beyond "proof that the relevant government organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period." *Id.* A-4. In the court of appeals' view, the statute contains "no qualification that the prohibited conduct must have some relation to federal funds." *Id.* A-8.

The panel recognized that this Court had left the issue of a required nexus open in *Salinas* v. *United States*, 522 U.S. 52, 59 (1997), which explained: "We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves." But the Eighth Circuit joined the Fifth, Sixth, and Seventh Circuits in agreeing with the government that Section 666 requires no nexus to a federal program. Pet. App. A-14 (citing *United States* v. *Dakota*, 197 F.3d 821 (6th Cir. 1999); *United States* v. *Grossi*, 143 F.3d 348 (7th Cir. 1998), *cert. denied*, 525 U.S. 879 (1998); *United States* v. *Westmoreland*, 841 F.2d 572 (5th Cir. 1988), *cert. denied*, 488 U.S. 820 (1988)). The court "respectfully disagree[d]" with the contrary holdings of the Second and Third Circuits, as well as a panel ruling of the Sixth Circuit questioning that court's prior precedent. *Id.* A-8 & n.4 (citing *United States* v. *Suarez*, 263 F.3d 468 (6th Cir. 2001); *United States* v. *Zwick*, 199 F.3d 672 (3rd Cir. 1999); *United States* v. *Santopietro*, 166 F.3d 88 (2nd Cir. 1999)).

The panel majority next determined that "Congress had the power to enact § 666," despite the absence of any required nexus between the alleged bribe and a federal program. Pet. App. A-14. The majority rejected the government's argument that the statute was a lawful exercise

of the spending power. Section 666 does not contain "contractual 'terms' with which the recipient of federal funds must comply" (*id.* A-17) and furthermore "directly regulates the conduct of third parties and not the recipients of the federal benefits" (*id.* A-17). See also *id.* A-18 n.5 (noting stark three-way division among a panel of the Fifth Circuit on validity of Section 666 under the spending power).

The Eighth Circuit nonetheless sustained Section 666 on a theory the government had disavowed – that it "is a law necessary and proper to the execution of Congress's spending power." Pet. App. A-21. After deciding that "Congress has the authority to enact general criminal legislation incident to its specifically enumerated powers" (*id.* A-22-23), the majority concluded that the statute is "rationally related" to "achieving the efficacious expenditure of federal funds" (*id.* A-24) "by policing the integrity of the entire organization that receives federal benefits" (*id.* A-26). It furthermore regarded as "untenable" a scheme under which "the protection of federal funds would be left to the whim of state and local officials." *Id.* A-28.

b. Writing in dissent, Judge Bye agreed with the majority both that Section 666 does not require proof of a nexus between an alleged bribe and any federal program and that the statute is not a valid exercise of the spending power, but he dissented from the court's conclusion that the statute is a valid exercise of Congress's authority under the Necessary and Proper Clause. Pet. App. A-29-A-36. Judge Bye accepted that Section 666 was a "rational" means of protecting federal expenditures (*id.* A-31), but – noting that "the government [itself] expressed considerable discomfort" with reliance on the Necessary and Proper Clause – explained that was insufficient to render the statute "proper" under this Court's decisions in *Printz* v. *United States*, 521 U.S. 898 (1997), and *Alden* v. *Maine*, 527 U.S. 706 (1999). "These cases teach us that a law is 'proper' for the enforcement of an enumerated power only if it hews to constitutional principles of limited federal government and

state sovereignty. Federal laws that usurp the traditional domain of state authority are therefore not 'proper.'" *Id.* A-36.

Section 666, in Judge Bye's view, transgresses that fundamental limitation on congressional power and thus "lies outside the guideposts erected in *Printz* and *Alden* for assessing a 'proper' law." Pet. App. A-33. "[I]t is beyond dispute that every state--and nearly every county, tribe and city--receives [$10,000] in yearly federal benefits. Moreover, the statute requires no connection between those federal benefits and the bribe. The lack of any connection makes all too real the risk that federal anticorruption efforts will swamp state and local efforts to combat bribery." *Id.* A-33-34. The majority's contrary holding, he explained, amounts to a "federalization of anticorruption law" that "swims against the tide of governing law," including the "wave of recent Supreme Court decisions [that] emphasizes Congress's limited authority to federalize criminal conduct and to interfere with matters traditionally left to state governance." *Id.* A-29-3-, A-33 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000); *Alden*, *supra*; *Printz*, *supra*; *United States* v. *Lopez*, 514 U.S. 549 (1995)). Judge Bye likened the majority's "sweeping view" of the Necessary and Proper Clause to "Congress' unbounded deployment of its Commerce Clause authority before *Lopez* and *Morrison*." *Id.* A-34-35.

5. Recognizing the substantial prospect that this Court would grant certiorari to resolve the circuit conflict directly implicated by the case, the court of appeals stayed its mandate pending the filing and disposition of this petition. This petition followed.

REASONS FOR GRANTING THE WRIT

Subsequent to *Salinas*, the circuits have "split on whether to require a federal nexus" (*United States* v. *Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003)), repeatedly acknowledging that "the law is unsettled as to what § 666

requires," for "*Salinas* has not prevented courts from reaching conflicting conclusions on whether § 666 requires proof of a federal interest in the offense conduct" (*United States* v. *Zwick*, 199 F.3d 672, 681 (3rd Cir. 1999)). See also *Zwick*, 199 F.3d at 682 (noting "the struggle of other courts to construe [the] meaning" of Section 666); *United States* v. *Kranovich*, 244 F. Supp.2d 1109, 1114 (D. Nev. 2003) ("As a result of the Supreme Court's holding in *Salinas*, a circuit split has developed on the issue of whether some sort of nexus or connection must be shown."). The conflict can only be resolved by this Court, as multiple courts of appeals are on each side of the issue, and courts on each side have furthermore denied rehearing en banc to reconsider their positions.[1]

1. The decision below is in accord with the holding of the Fifth, Sixth, and Seventh Circuits, although a panel of the Sixth Circuit has expressed doubts about that court's precedent. *United States* v. *Reyes*, 239 F.3d 722, 733-34 (5th Cir. 2001) (applying *United States* v. *Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988) ("It is sufficient that Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.")); *United States* v. *Dakota*, 197 F.3d 821, 826 (6th Cir. 1999) (applying circuit precedent holding "that the statute requires no relationship between the illegal activity and the federal funding"), *reh'g en banc deniedFeb. 4, 2000*; *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir. 1998) ("It is not our part to trim § 666 by giving its text a crabbed reading."), *reh'g en banc denied May 29, 1998*. *Compare United States* v. *Suarez*, 263 F.3d 468, 489 (6th Cir. 2001) ("Were we writing on a clean slate, I, like the dissent, might

[1] The Ninth Circuit has left the question open, although it has held that "the defrauded program or agency must receive federal funding directly, and that entities receiving only indirect benefits of federal funding * * * are not within the [statute's] purview." *United States* v. *Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003).

well agree that proper application of 18 U.S.C. § 666 requires a minimal nexus between the alleged criminal activity and the federal funding received pursuant to that statute.").

Even within those courts of appeals that have sustained Section 666 as constitutional, there is a conflict over the ground on which it was validly enacted. The other Circuits that have addressed this issue deem the statute a valid exercise of the spending power. See e.g., *United States States* v. *Zwick*, 199 F.3d 672 (1999); *United States* v. *Santopietro*, 166 F.3d 88 (2nd Cir. 1999); *United States* v. *McCormack*, 31 F.Supp.2d 176, 186 n. 18 (D.Mass. 1998) (collecting cases); see also *Fisher* v. *United States*, 529 U.S. 667, 689 (2000) (Thomas J., dissenting); *United States* v. *Suarez*, 263 F.3d 468, 487 n. 7 (6th Cir. 2001 (Boggs, J., dissenting in part). The Eighth Circuit expressly rejected that view in this case, holding that Congress's authority under the Spending Clause does not extend to a statute that does not contain "contractual 'terms' with which the recipient of federal funds must comply" (Pet. App. A-17) and furthermore "directly regulates the conduct of third parties and not the recipients of the federal benefits" (*id.* A-17).

2. The decision below squarely conflicts with decisions of Second, Third, and Eleventh Circuits. The Third Circuit in *United States* v. *Zwick*, 199 F.3d 672 (1999), held that a prosecution under Section 666 requires proof of a nexus to a federal program. The court found that conclusion supported by the statutory text in two respects. "[T]he title of § 666, 'Theft or bribery concerning programs receiving Federal funds,' implies that a federal connection is anticipated." *Id.* at 682. The same conclusion follows from "the statute's reference only to 'agents' of entities receiving federal funds who accept bribes 'in connection with' the business of the organization receiving federal funds." *Id.*

According to the Third Circuit, this reading of the statute is consistent with the legislative history of Section 666. The goal of Section 666 "was to overcome impediments to reaching actions in which there was a federal

interest, not to federalize crimes in which a federal interest was lacking." *Zwick*, 199 F.3d at 684. Thus, the court concluded that "nothing in the legislative history suggests that Congress intended to * * * make § 666 applicable when no federal interest is implicated by certain offense conduct." *Id.* at 686.

The Third Circuit also found its holding supported by three canons of construction. First and foremost, this Court's precedents instruct "that we should not interpret a statute in a manner that significantly alters the federal-state balance unless Congress has clearly indicated that it intended to do so," which cannot be said of Section 666. 199 F.3d at 686 (citing *United States* v. *Bass*, 404 U.S. 336, 349 (1971). "[T]he government's interpretation * * * would criminalize a host of corrupt acts committed by state agents, among others, by virtue of the fact that all states receive at least $10,000 in federal funds per year." *Id.* The Third Circuit declined to "transform § 666 into a general federal anti-corruption statute when Congress has not clearly expressed its intention to do so." *Id.* Second, "ambiguity in the language of a criminal statute should be resolved in favor of the defendant." *Id.* (citing *Bass*, *supra*). Third, "when a statute is unclear, we will construe it so as to avoid constitutional concerns, assuming that such construction does not amount to a rewriting of the statute," a principle implicated by the fact that the government's reading "produces serious concerns as to whether Congress exceeded its power under the Spending Clause in enacting this statute." *Id.* at 687; see *United States* v. *Kranovich*, 244 F. Supp. 2d 1109, 1116 ("Requiring that the application of Section 666 be limited to conduct bearing on the expenditure of federal funds or the protection of the integrity of a federal program keeps Section 666 on firm constitutional ground.").

The Third Circuit in *Zwick* also relied on the similar holding of *United States* v. *Santopietro*, 166 F.3d 88 (2nd Cir. 1999) (per Newman, J.). The Second Circuit in *Santopietro* concluded that "nothing in *Salinas* disturbs" the

requirement, first adopted by that court in *United States* v. *Foley*, 73 F.3d 484 (1996), that a Section 666 prosecution rest on a "connection between the bribe and a risk to the integrity of the federally funded program." 166 F.3d at 93. "Indeed, *Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied." *Id.*

Subsequently, the Eleventh Circuit strongly suggested that it would reach the same result. The Eleventh Circuit concluded that this Court's "approach to § 666 has validated the efforts of the Second and Third Circuits" to identify a constraint on the scope of the statute – *viz.*, "the recognition of an offense element limiting the statute's application to conduct bearing a sufficient connection to the expenditure of federal funds or the integrity of federal programs." *United States* v. *Ward*, 304 F.3d 1320, 1325 (2002). According to the Eleventh Circuit, this Court's decisions "confirm[] the existence of the constitutional limits suspected by the Second and Third Circuits." *Id.*

Several district courts agree with the position of the Second, Third, and Eleventh Circuits. See *United States* v. *Kranovich*, 244 F. Supp. 2d 1109 (D. Nev. 2003); *United States* v. *Wright*, 206 F. Supp.2d 609, 620 (D. De. 2002); *United States* v. *Frega*, 933 F. Supp. 1536, 1540 (S.D. Cal. 1996) (reading Section 666 not to include federal nexus requirement "would drastically change the balance of power between federal and state governments by bringing conduct that has previously been entirely in the realm of the states within the federal purview").

3. This case presents an ideal vehicle to resolve the conflict. The lower courts resolved only the question of law presented by the petition: Does 18 U.S.C. 666 criminalize acts of bribery lacking a nexus to a federal interest and, if so, is the statute in that respect a constitutional exercise of Congress's powers? That is accordingly the only question this Court would have cause to resolve. Assuming that this

Court concluded that the government is obliged to demonstrate such a nexus, it would be left to the lower courts to apply that standard to this case. But even if this Court were inclined to go further and address whether the indictment in this case asserts a sufficient nexus, there is no question that a ruling in petitioner's favor would at the least require the dismissal of the first two counts of the indictment, which do not contain even an arguable assertion of a relationship between petitioner's alleged conduct and a federal funding program.

Nor would there be any benefit to permitting the case to proceed on remand. Critically, the Eighth Circuit held that the government is not required to introduce any evidence of a relationship between an alleged bribe and a federally funded program. Further proceedings in the district court accordingly will not illuminate the question presented as it relates to this case. Indeed, the suitability as a vehicle of any case raising the question presented after trial is apt to be clouded by the government's suggestion that the case is an inappropriate vehicle because there is *some* evidence in the record of *some* relationship between the charged offense and federal programs. The issue would accordingly best be addressed in the posture of this case, which was dismissed on the ground that the indictment did not charge an offense within Congress's power to proscribe.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX INDEX

Decision of the United States Court of Appeals for the Eighth Circuit, dated April 7, 2003..... A-1

Memorandum Opinion and Order, United States District Court for the District of Minnesota, dated January 28, 2002..... A-37

Indictment in United States v. Basim Omar Sabri, dated August 21, 2001..... A-63

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1561

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
Basim Omar Sabri,	*	
	*	
Appellee.	*	

Submitted: June 14, 2002
Filed: April 7, 2003

Before HANSEN,[1] Chief Judge, BOWMAN and BYE, Circuit Judges.

HANSEN, Circuit Judge.

The government appeals from an order of the district court dismissing an indictment against Basim Omar Sabri. We reverse the judgment of the district court.

I.

The grand jury charged Sabri with three counts of bribery in violation of 18 U.S.C. §666(a)(2).[2] The indictment alleged the

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[1] The Honorable David R. Hansen stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 31, 2003: He has been succeeded by the Honorable James B. Loken.

[2] The statute provides, in relevant part, that:

following facts. The City of Minneapolis (hereinafter "City") received approximately $28.8 million in federal funds during the calendar year beginning January 1, 2001. The Minneapolis Community Development Agency (hereinafter "MCDA") is a City agency created to fund housing and economic development programs within the City. MCDA received approximately $23 million in federal funds in the calendar year beginning January 1, 2001. The Minneapolis Neighborhood Revitalization Program (hereinafter "MNRP") is an agency created by the City and other local government entities which provides funding for the economic

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> (a) Whoever, if the circumstance described in subsection (b) of this section exists-
>
> . . . .
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. §666 (2000).

revitalization of City neighborhoods. MCDA wholly funds MNRP.

Sabri is a Minneapolis developer and landlord. During the spring and summer of 2001, Sabri was pursuing a commercial real estate project within the City's Eighth Ward. From 1993 through July 2001, Brian Herron served on the City Council, representing the Eighth Ward. He also served on the Board of Commissioners overseeing MCDA's budget. The government alleged that Sabri gave Herron $5000 in an attempt to obtain Herron's assistance in receiving regulatory approval from the City to commence the proposed real estate project; that Sabri offered Herron $10,000 to threaten the current property owners that the City would use its powers of eminent domain to take their property if they did not sell to Sabri; and that Sabri offered to give Herron $80,000 as a 10% kickback in return for his assisting Sabri to obtain $800,000 in community economic development grants for the proposed real estate project.

Sabri filed a motion to dismiss the indictment on the ground that §666(a)(2) was facially unconstitutional because it does not require the government to prove a nexus between the offense conduct the offering of a bribe-and the federal funds. Without such a "jurisdictional hook," that is, a clause that purports to ensure that the law applies only to activity that falls within the federal lawmaking power, Sabri argued that the statute was outside Congress's legislative power. The district court agreed with Sabri's arguments and granted his motion to dismiss the indictment.[3] We agree with the district

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[3] To the extent that the district court, relying on United States v. Lopez, 514 U.S. 549 (1995), concluded that §666 contained no "'express jurisdictional element' that confer[red] federal court jurisdiction over the offenses described in §666," United States v. Sabri, 183 F. Supp. 2d 1145, 1154 (D. Minn. 2002), it erred. The Lopez Court's use of the word "jurisdiction"

court that as a matter of statutory construction the government need not prove some nexus between the offense conduct and federal funds. We respectfully disagree that the statute as construed is beyond Congress's power to legislate.

II.

We first turn to the question of statutory construction: whether §666 itself requires that the government prove some connection between the offense conduct and the expenditure or use of federal funds. We hold that §666 contains no requirement that the government prove some connection between the offense conduct and federal funds beyond the express statutory requirement found in §666(b) which requires proof that the relevant organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period.

The Supreme Court addressed this question of statutory construction in part in Salinas v. United States, 522 U.S. 52 (1997). Salinas, a deputy sheriff who had accepted bribes in exchange for arranging "contact visits" between a federal prisoner housed in the Hidalgo County jail and the prisoner's wife and girlfriend, argued that "the Government must prove

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referred to the power of the Congress to enact legislation and not to the subject matter jurisdiction of the court. Lopez, 514 U.S. at 561. The district court had subject matter jurisdiction over this case because Sabri was charged with an "offense[] against the laws of the United States:"18 U.S.C. §3231 (2000). See e.g., United States v. Ryan, 41 F.3d 361, 363 (8th Cir. 1994) (en banc) (concluding that the express jurisdictional element contained in 18 U.S.C. §844(i) was merely an element of the offense and that "the court [would] not by the failure of proof on that element [be] deprived of judicial jurisdiction"), cert. denied, 514 U.S. 1082 (1995).

the bribe in some way affected federal funds, for instance by diverting or misappropriating them" before the statute was violated. Id. at 55. A unanimous Court rejected Salinas's argument, noting that the "enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate" the statute. id. at 56-57. Specifically, the Court noted that the word "'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction," Id. at 57, and "that, as a matter of statutory construction, §666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds," id. at 61.

The only issue before the Salinas Court, however, was a narrow question of statutory construction: whether "§ 666 [is] limited to cases in which the bribe has a demonstrated effect upon federal funds." Id. at 54 (emphasis added). The Court explicitly left open the more sweeping question of whether §666 requires the government to demonstrate some other, less direct connection between the offense conduct and federal funds. Id. at 59 ("We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a .prisoner in facilities paid for in significant part by federal funds themselves."); see also United States v. Zwick, 199 F.3d 672, 679 (3d Cir. 1999) (stating that the Salinas Court resolved the question of whether the government must show that the offense conduct actually affected or involved federal funds but left open the question of whether §666 requires some other connection between the offense conduct and the expenditure of federal funds). Several of our sister circuits have addressed this more broad question.

The Seventh Circuit has given §666 a broad reading, ultimately concluding that "[i]t [was] not [its] part to trim §666, by giving its text a crabbed reading." United States v Grossi, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998). Likewise, the Sixth Circuit has concluded that "18 U.S.C. §666 does not require a nexus between the alleged bribes and the, federal funding." United States v. Dakota, 197 F.3d 821, 826 (6th Cir. 1999).[4] The Fifth Circuit also has eschewed any nexus requirement. In United States v. Westmoreland, 841 F.2d 572 (5th Cir.), cert. denied, 488 U.S. 820 (1988), a county supervisor was convicted of accepting bribes and kickbacks in connection with her duty to purchase supplies for the county's highway construction projects. Id. at 573-74. The county received $222,949 in federal funds, but those funds were segregated and the alleged criminal activity did not affect or implicate federal monies. Id. 575. Nonetheless, the Fifth Circuit concluded that:

> [b]y the terms of section 666, when a local government agency receives an annual benefit of more than $10,000 under a federal assistance program, its agents are governed by the statute, and an agent violates subsection (b) when he engages in the prohibited conduct in any transaction or matter or series of transactions or matters . . . concerning the affairs of the local government agency.

[4] Although the Sixth Circuit has applied Dakota as good law, it has questioned its validity. See United States v. Suarez, 263 F.3d 468, 489 (6th Cir. 2001) (stating that if the court were writing on a clean slate, it "might well agree that proper application of 18 U. S.C. §666 requires a minimal nexus between the alleged criminal activity and the federal funding received pursuant to that statute," but in light of Dakota, it was bound to conclude that §666 requires no nexus), cert. denied, 535 U.S. 991 (2002).

Id. at 576 (internal quotation omitted). The Fifth Circuit reaffirmed its position in United States v. Moeller, 987 F.2d 1134 (5th Cir. 1993), concluding that §666 required only a nexus between the offense conduct and the agency receiving federal funds and that this nexus was satisfied by §666(b). Id. at 1137. It confirmed its position more recently in United States v. Lipscomb, 299 F.3d 303 (5th Cir. 2002), in an opinion the court itself described as suffering from "tripartite fractionation." Id. at 305 (Wiener, J.). Despite their differences on other issues, see infra Part III. A., n.5, all members of the Lipscomb panel agreed that Westmoreland is still the law of the Fifth Circuit. See id. at 313 (Wiener, J.), 354 (Duhé, J., concurring in part, dissenting in part), 365 (Smith, J., dissenting).

Two circuits, the Second and the Third, conclude that §666 requires the government to prove at least some minimal nexus between the bribery and the federal benefits beyond that explicitly required in § 666(b). See Zwick,199 F.3d at 682 n.7; United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999).

In Santopietro, the Second Circuit recognized that Salinas limited its decision in United States v. Foley, 73 F.3d 484 (2d Cir. 1996), but concluded that it left untouched that part of Foley holding that §666 "requires at least some connection between the bribe and a risk to the integrity of the federal funded program." Santopietro, 166 F.3d at 93. The Foley Court reached the conclusion that §666 required the government to prove a connection between the bribe and the federal funds only after finding the statute to be ambiguous and then turning to the legislative history to resolve that ambiguity. Foley, 73 F.3d at 489.

Despite the long-standing principle of statutory construction that the title of a statute cannot control the plain language of the statute, the Third Circuit reasoned that the title of §666, "Theft or bribery concerning programs receiving Federal funds," implied that the statute contains a minimal nexus requirement. Zwick, 199 F.3d at 682. It avoided the "literal interpretation" of the statute and instead relied upon legislative history to construct a "plausible, albeit more contextual[] alternative" reading. Id. at 683. It reasoned that "Salinas found §666(a)(1)(B) clear and unambiguous only on the question of whether the government must prove that the corrupt activity had a demonstrated effect on federal funds or programming," id. at 682 n.7, but that "nothing in Salinas prevent[ed it] from determining that §666(a)(1)(B) is ambiguous on the issue of whether there is a federal connection requirement," id. We respectfully disagree with the proposition that §666 is ambiguous on the federal connection requirement.

As with any question of statutory construction, we look first to the text of the statute itself. United States v. McIntosh, 236 F.3d 968, 971 (8th Cir.), cert. denied, 532 U.S. 1022 (2001). Section 666(a)(2) makes it a crime to "corruptly give[], offer[], or agree [] to give anything of value to any person, with intent to influence or reward an agent of a[] ... local ... government, ... or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more" if the "organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance or other form of Federal assistance." 18 U.S.C. §666 (emphasis added). The plain language encompasses the activity of local agents wherever subsection (b) attains. There is no qualification that the prohibited conduct must have some relation to federal

funds. Indeed, the statute proscribes the conduct of local agents in connection with "any" agency business or transaction. The word "any" is unambiguous and unqualified. Salinas, 522 U.S. at 57; Mo. Mun. League v. F.C.C., 299 F.3d 949, 955 (8th Cir. 2002) (citing cases and stating that time and time again the Court has held that the modifier "any" prohibits a narrow construction of a statute), petition for cert. filed (Feb. 18, 2003) (No. 02-1238); Westmoreland, 841 F.2d at 576 (" [T]he relevant statutory language [is] plain and unambiguous. ");United States v. McCormack, 31 F. Supp. 2d 176, 186 (D. Mass. 1998) (stating Salinas "announced that the statutory language, 'in connection with any business or transaction' is not ambiguous," that "[t]he language is clear," and that "the reach of the statute is clearly broad"). It is clear to us that the plain text of the statute does not require any connection between the federal funds received by the agency and the offense conduct. The statute applies to all offense conduct involving anything of value of $5000 or more that involves "any" agency business, transaction, or series of transactions so long as the relevant agency received the requisite amount of federal benefits ($10,000) within the defined time period as required in §666(b).

The argument that §666 is unambiguous as to the narrow question answered in Salinas but ambiguous as to the broad question presented here is unpersuasive. "A statute can be unambiguous without addressing every interpretive theory offered .... It need only be plain to anyone reading the Act that the statute encompasses the conduct at issue." Salinas, 522 U.S. at 60 (internal quotation omitted). Thus, while it is true that the Salinas Court held only that the government need not prove that the offense conduct directly affected federal funds, the Salinas Court's characterization of the operative terms of the statute as broad and unqualified supports our conclusion that the statute is also unambiguous as to the broader question presented here. See Salinas, 522 U.S. at 56

(stating that "[t]he enactment's expansive, unqualified language" does not support a limiting interpretation of the statute), 57 ("The prohibition is not confined to a business or transaction which affects federal funds."), 57 ("Furthermore, the broad definition of the 'circumstances' to which the statute applies provides no textual basis for limiting the reach of the bribery prohibition."), 57 ("The statute applies to all cases in which an 'organization, government, or agency' receives the statutory amount of benefits under a federal program."), 57 ("The statute's plain language fails to provide any basis for limiting §666(a)(1)(B) to bribes affecting federal funds."). The Court reaffirmed this broad reading of §666 in Fischer v. United States, 529 U.S. 667 (2000). There, the court described §666 as "expansive, both as to the conduct forbidden and the entities covered." Id. at 678 (internal quotations and alteration omitted).

The fact that the Salinas Court construed §666(a)(1)(B) and that this case involves §666(a)(2) makes no difference in our analysis. Section (a)(1) and section (a)(2) are complementary provisions: one section criminalizes the solicitation or acceptance of bribes while the other criminalizes the offering or giving of bribes. Both provisions, however, prohibit bribery in connection with "any business, transaction, or series of transactions" of organizations which receive the requisite amount of federal benefits required in subsection (b). Neither provision suggests that the business or transaction in question must somehow implicate a federal program. For the point under consideration here, the relevant terms of the two sections are identical. Therefore, relying on the text of the statute and the Supreme Court's characterization of the operative language in the statute as broad and unqualified, we conclude that §666 is unambiguous as to the question presented here.

Generally, where the text of a statute is unambiguous, the statute should be enforced as written, McIntosh, 236 F.3d at 972, and "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language," United States v. Albertini, 472 U.S. 675, 680 (1985) (internal quotation omitted). We find no extraordinary showing of contrary intent that warrants deviation from the plain text of the statute. Congress enacted §666 to "safeguard finite federal resources from corruption and to police those with control of federal funds." U.S. v. Rooney, 37 F.3d 847, 851 (2d Cir.1994); see also S. Rep. No. 98-225, at 370 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3511 ("[T]he purpose of this section [is] to protect the integrity of the vast sums of money distributed through federal programs."). Prior to the enactment of §666, however, the task of protecting the integrity of federal funds was made more difficult because of gaps in the statutory scheme. Specifically, prior to the enactment of §666:

> thefts from other organizations or governments receiving federal financial assistance [could have been] prosecuted under the general theft of federal property statute, 18 U.S.C. 641, only if it [could have been] shown that the property stolen [was] property of the United States. In many cases, such prosecution [was] impossible because title ha[d] passed to the recipient before the property [was] stolen, or the finds [were] so commingled that the federal character of the funds [could not] be shown. This situation [gave] rise to a serious gap in the law, since even though title to the monies may have passed, the federal government clearly retain[ed] a strong interest in assuring the integrity of such program funds.

S. Rep. No. 98-225, at 369, reprinted in 1984 U.S.C.C.A.N. at 3510; see also United States v. Ferrara, 990 F. Supp.146, 149-50 (E.D.N.Y. 1998) ("Moreover, [prior to the enactment of

§666,] successful prosecutions were impossible in those instances where title to the federal property had passed to a recipient before the property was stolen, or where the federal character of the funds was irredeemably lost due to commingling with non-federal monies."). Section 666 was passed to fill the gaps in the prior anticorruption scheme. Westmoreland, 841 F.2d at 577 (stating that Congress specifically chose to protect the integrity of federal funds "by enacting a criminal statute that would eliminate the need to trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds and control their administration"). Congress decided that the most effective way to insure the integrity of federal funds disbursed to sub-national agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the integrity of the recipient agencies. Fischer, 529 U.S. at 678 ("Coupled with the broad substantive prohibitions of subsection (a), the language of subsection (b) reveals Congress's expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs."); United States v. Simas, 937 F.2d 459, 463 (9th Cir. 1991) ("By enacting section 666; Congress plainly decided to protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of federal fiends to a particular illegal transaction."); Westmoreland, 841 F.2d at 578 ("Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.").

The legislative history reveals that §666 was drafted and enacted to "extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds," Salinas, 522 U.S. at 58 (emphasis added), and not to limit the scope of the federal bribery prohibition. In addition, because §666 changed the focus of

federal anticorruption efforts from policing federal funds to policing the agencies that receive and administer those funds, the argument that there must be a nexus between the offense conduct and the federal funds beyond that explicitly provided for in §666(b) seems inconsistent with the statute. In any event, in light of the foregoing legislative history we conclude, at minimum, that there is no clear or extraordinary showing of contrary legislative intent sufficient to cause us to override the text of a statute unambiguous on its face.

While we recognize that in construing statutes courts should avoid constitutional questions where possible, we note that even if we were to conclude that §666 contained an unstated nexus requirement between the offense conduct and the federal funds, that would not dispose of the lurking constitutional question. Simply concluding that the statute contains an undefined nexus requirement ignores the constitutional question of whether Congress had the power to enact this statute at all. No amount of creative interpolation could save a statute that Congress lacked the authority to enact. United States v. Morgan, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring) ("Judicial efforts to render §666 palatable by adding an element to the crime cannot alter our Constitution's basic limitation on federal legislative power. No amount of creative drafting permits the judiciary to preserve a statute that Congress plainly lacked the power to create."), cert. denied, 534 U.S. 825 (2001). Because we conclude, however, that §666 as construed is a law necessary and proper to the execution of the Spending Power; see infra Part III.B., we need not worry about limiting the scope of a plainly written statute.

Given the plain and unambiguous language of the statute and the absence of any extraordinary contrary legislative history which suggests that we should deviate from the text, we are compelled to conclude that other than the threshold

showing that the agency in question received more than $10,000 in federal benefits in any one-year period, §666 imposes no requirement that there be a connection between the offense conduct and the federal funds. See Morgan, 230 F.3d at 1073 (Bye, J., concurring) (concluding that a federal nexus requirement should not be read into §666 on the grounds that the court should not inject elements into plain and unambiguous statutes); George D. Brown, Stealth Statute--Corruption, The Spending Power, and the Rise of 18 U.S.C. §666, 73 Notre Dame L. Rev. 247, 280-81 (1998) ("[I]t is impossible to deny that the actual statute is the antithesis of narrow. Fairly read, it gives the federal government authority to deal with a range of malfeasance anywhere within governmental ... entities that benefit from a variety of programs, whether or not the wrongdoing is connected to the federal assistance.").

III.

Having determined that the statute does not require a nexus between the criminal activity and the federal funds, we now turn to the question of whether Congress had the power to enact §666. We review this federal constitutional question de novo. United States v. Shepherd, 284 F.3d 965, 969 (8th Cir. 2002).

A. Section 666 is not a condition placed on the receipt of federal funds.

It is axiomatic that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." United States v. Morrison, 529 U.S. 598, 607 (2000). The courts that have applied §666 agree that Congress enacted §666 pursuant to its spending powers. See e.g., Fischer, 529 U.S. at 689-90 n.3 (Thomas, J., dissenting); McCormack, 31 F. Supp. 2d at 186 n.18 (collecting cases).

The spending power is encompassed in Art. I., §8, cl. l, of the Constitution. Pennhurst State Sch. v. Halderman, 451 U.S. l, 9 n.5 (1981). It provides that the "Congress shall have Power To ... provide for the ... general Welfare of the United States." U.S. Const. art. I, cl. l. The Supreme Court has "repeatedly characterized ... Spending Clause legislation as much in the nature of a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions." Barnes v. Gorman 122 S. Ct. 2097, 2100-01 (2002) (internal quotation and alteration omitted). The government argues that §666 can be sustained as a valid condition placed on the receipt of federal funds. We disagree.

While traditional Spending Clause legislation is in the "nature" of a contract, it is not a contract. Mo. Child Care Assn v. Cross, 294 F.3d 1034, 1041 (8th Cir. 2002). Instead, "contract" is used only metaphorically to illuminate and explain certain aspects of the relationship formed between the federal government and the recipient of the federal funds. We find this metaphor useful to our discussion here, and we note that §666 has none of the hallmarks of a contractual relationship which characterizes typical Spending Clause legislation.

Unlike typical Spending Clause enactments, §666 imposes no affirmative obligation on the recipient of federal funds. Cf. South Dakota v. Dole, 483 U.S. 203, 205 (1987) (sustaining 23 U.S.C. §158 (1982 ed. Supp. III), which directed the Secretary of Transportation to withhold a certain percentage of federal highway funds from states which had not yet made it illegal for a person under age 21 to purchase or possess alcohol, as a valid condition on the receipt of federal funds); Pennhurst, 451 U.S. at 12-13 (noting that under the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, the recipient of federal funds had to take "'affirmative action' to hire qualified

handicapped individuals," submit a plan evaluating services offered under the Act, and provide the federal government with assurances that each person serviced in the program had a habilitation plan); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) ("Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal . . . directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy."), 474 ("The program conditions receipt of public works grants upon agreement by the state or local governmental grantee that at least 10% of the federal funds will be devoted to contracts with minority businesses."), overruled on other grounds by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

Nor does §666 proscribe conduct of the recipient of the federal funds. Cf. Barnes, 122 S. Ct. at 2101 n. 1 (concluding that valid Spending Clause legislation can include legislation that "simply prohibits certain discriminatory conduct." (internal quotation and alteration omitted)); Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2272-73 (2002) (describing the Family Educational Rights and Privacy Act of 1974, 88 Stat. 571, as a conditions statute which authorizes the withholding of federal funds from educational institutions that permit the release of education records without the consent of the students); Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 638 (1999) (discussing Title IX of the Education Amendments of 1972, 86 Stat. 373, which prohibits sex-based discrimination under any education program receiving federal financial assistance); Lau v. Nichols, 414 U.S. 563, 566 (1974) (upholding application of the Civil Rights Act of 1964, 78 Stat. 241, which prohibits discrimination in any program or activity receiving federal financial assistance).

As such, §666 has no contractual "terms" with which the recipient of federal funds must comply. Barnes, 122 S. Ct. at 2101 ("Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress's power to legislate under the spending power rests on whether the recipient voluntarily and knowingly accepts the terms of the 'contract.'" (internal quotation and alteration omitted)). We conclude therefore that §666 is not a conditions statute at all and that the traditional Dole analysis is inapplicable here. United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995) ("18 U.S.C. §666 does not impose a condition on the receipt of federal funds. The statute neither requires a state's compliance with federal regulatory or administrative directives, nor prevents state action. . . . Section 666 does not derogate any state right.... Section 666 does not force the state government to do anything." (internal citations and quotations omitted)), aff'd 141 F.3d 1152 (2d Cir.), cert. denied, 525 U.S. 814 (1998).

The fact that §666 directly regulates the conduct of third parties and not the recipients of the federal benefits supports our conclusion that this is not a conditions statute at all. Morgan, 230 F.3d at 1074 (Bye, J., concurring) ("In enacting §666, ...Congress did not contract with states or local governments .... Section 666 reaches beyond punishment of the state and local governments who receive those funds to proscribe the conduct of third persons who aren't parties to the funding contract."); Cantor, 897 F. Supp. at 113 ("All Congress has done in Section 666 is to pass a law making the conduct of individuals, not the state, criminal." (internal quotations omitted)). We could find no persuasive or authoritative case law supporting the proposition that Congress, acting pursuant to its power to attach conditions to the receipt of federal funds, has the authority to directly regulate the conduct of third parties who are not actually the

recipients of the federal funds.[5] Instead, the case law demonstrates that funding condition statutes may only directly regulate the recipients of the federal funds who then may or may not undertake action vis-a-vis third parties. See e.g., Davis, 526 U.S. at 640 ("[I]n return for federal funds, the States agree to comply with federally imposed conditions." (internal quotation omitted) (emphasis added)), 641 (affirming statute because it was drafted in such a way that "[t]he Government's enforcement power may only be exercised against the funding recipient." (emphasis added)); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) ("The two statutes [Title VI and Title IX] operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." (emphasis added)); Dole, 483 U.S. at 206 ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal ...directives." (emphasis added) (internal quotations omitted)); Oklahoma v. United States Civil Svc. Comm'n,

[5] The Fifth Circuit recently addressed the question of whether §666 can be sustained as a condition on the receipt of federal funds. The panel could not generate a majority for any position. Judge Wiener opined that §666 was similar to a crosscutting condition-one that applies to all grants of federal money-and applied the Dole conditions analysis. Lipscomb, 299 F.3d at 318-23 (Wiener, J., writing separately as to Part V. B.). Judge Duhé did not reach the issue, because, he argued, it was not raised at trial or on appeal. Id. at 360 (Duhé, J., concurring in part and dissenting in part). Judge Jerry E. Smith concluded that §666 "does not qualify as a conditional grant statute." Id. at 366 (Smith, J., dissenting).

330 U.S. 127, 144 (1947) ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans ...is not unusual." (emphasis added)). Accordingly, we conclude that §666 cannot be sustained as a condition attached to the receipt of federal funds because this statute is not a conditions statute at all. Section 666 is merely a general criminal statute which directly regulates the conduct of persons who are not parties to the funding "contract."

B. Section 666 is a necessary and proper exercise of Congressional power.

Our conclusion that this statute is not a conditions-type statute does not necessarily render it infirm. Indeed, the Supreme Court has intimated that §666 is a constitutional exercise of Congress's legislative power. See Salinas, 522 U.S. at 60 ("[T]here is no serious doubt about the constitutionality of §666(a)(1)(B) as applied to the facts of this case."), 61 ("We simply decide that ... §666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds and that under this construction the statute is constitutional as applied in this case."). Our brother Bye has previously concluded that the above quoted sentences are mere "constitutional speculations." Morgan, 230 F.3d at 1072 n.3. We find it significant that no member of the unanimous Salinas Court disagreed with or qualified these statements. In addition, in Fischer, the Court resolved another issue of statutory construction arising under §666, and no member of the Court suggested that the statute might be constitutionally infirm. We think it ill-advised to now declare that §666 is void ab initio as being outside of Congress's legislative domain after the Supreme Court has twice indicated that the statute can be constitutional as applied. With that thought in mind, we look beyond the Spending Clause to other provisions of the

Constitution which may or may not provide legal authority to sustain §666.

So that the Constitution "be not a splendid bauble," the framers of our government inserted the Necessary and Proper Clause into the Constitution to "remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution." M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21(1819). The Clause provides that "[t]he Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution" all the powers vested in the Government of the United States. U.S. Const. art. I, §8, c1.18. Both the Spending Power and the Necessary and Proper Clause are contained in section 8 of the first Article, and the Necessary and Proper Clause applies to the spending power, enabling Congress to enact all laws which are convenient to the exercise of disbursing federal funds. Fullilove, 448 U.S. at 474 ("[T]he power to 'provide for the ... general Welfare' is an independent grant of legislative authority, distinct from other broad congressional powers."); Buckley v. Valeo, 424 U.S. 1, 90 (1976) ("[T]he General Welfare Clause . . . is ... a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause."); M'Culloch, 17 U.S. at 421. We recognize that the Necessary and Proper Clause does not confer upon the Congress a broad police power. It does, however, allow Congress the luxury to choose from an array of means with which to implement its enumerated powers, including its Spending Power. Chief Justice Marshall has best articulated the relationship between constitutional means and ends: "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." M'Culloch, 17 U.S. at 421.

Applying the M'Culloch framework, we conclude that §666 is a law necessary and proper to the execution of Congress's spending power. See United States v. Edgar, 304 F.3d 1320, 1325 (11th Cir.) ("[W]e are persuaded that a basis for the enactment of §666 may be found in Congress's authority, under the Necessary and Proper Clause, to protect its capacity to fruitfully exercise the spending power.") cert. denied, 123 S. Ct. 679 (2002); United States v. Bigler, 907 F. Supp. 401, 402 (S.D. Fla. 1995) ("Article I, §8 gives Congress the power to 'provide for the ... general Welfare.' This power, in conjunction with the necessary and proper clause, gives Congress the power to enact §666. In doing so, Congress did not violate the principle of federalism, nor did it violate the tenth amendment."). First, we think it an incontestable proposition that the disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution. We further quickly conclude that Congress also has a legitimate right to protect these disbursements from misappropriation once made. We also conclude that §666 is consistent with and does not contravene the letter or spirit of the Constitution.[6]

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[6] The dissent argues that this law is not ''proper," that is, it contravenes the letter and spirit of the Constitution by failing to recognize constitutional principles of limited federal government and state sovereignty. In support of this argument, the dissent relies on Alden v. Maine, 527 U.S. 706 (1999), Printz v. United States, 521 U.S. 898 (1997), and New York v. United States, 505 U.S. 144 (1992), for the proposition that "[f]ederal laws that usurp the traditional domain of state authority are . . . not proper." Post at 4. We, respectfully, are of the view that the dissent reads these cases too broadly. Alden, Printz, and New York answer only the limited question of when the central government is prohibited from acting directly on the States or on the States' officers.

The difficult question in this case is whether §666 is an appropriate means plainly adapted to achieving Congress's end. The resolution of this inquiry raises two subsidiary questions: (1) whether Congress has the power to enact criminal legislation pursuant to the Necessary and Proper Clause, and if so, (2) whether §666 is plainly adapted, i.e., rationally related, to achieving Congress's end.

As to the first question, we have no doubt that the creation of a general criminal law incident to a constitutional end is

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See Alden, 527 U.S. at 712 ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); Printz, 521 U.S. at 935 (holding that Congress cannot compel State officers to administer federal regulatory program); New York, 505 U.S. at 149 (holding that Constitution does not confer upon Congress the power to compel the States to enact a regulatory program). These cases merely recognize the larger constitutional principle that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," and that "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts it lacks the power directly to compel the States to require or prohibit those acts." New York, 505 U.S. at 166; accord Alden, 527 U.S. at 714; Printz, 521 U.S. at 919-20. None of these cases addresses the question presented here: whether Congress has the authority to regulate the conduct of individuals, not States, who deal with organizations that receive federal benefits. Because there has been no clear signal from the Supreme Court that there are independent federalism-based limits on the power of Congress to regulate the conduct of individuals, we conclude that this statute is "proper" and does not contravene the letter or spirit of the Constitution.

within the sovereign power of the federal government. M'Culloch, 17 U.S. at 418 ("The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers."). Chief Justice Marshall provided concrete examples of the scope of this power in M'Culloch:

> Take, for example, the power 'to establish post-offices and post-roads.' This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail.... This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice.

Id. at 417. More recently, our court has recognized that Congress has the authority to pass a criminal law of general application pursuant to the Necessary and Proper Clause. See United States v. Dittrich, 100 F.3d 84, 87 (8th Cir. 1996) ("A law making it a crime to steal property from a Post Office is well within even the narrowest construction of the Necessary and Proper Clause."), cert. denied, 520 U.S. 1178 (1997); see also Dropps v. United States, 34 F.2d 15, 18 (8th Cir. 1929) ("That Congress has power under the constitution to enact a law punishing bribe taking on the part of officers of the United States and others acting in an official capacity for the United States is patently within its general powers to make all

laws necessary and proper for carrying into execution the particular powers specifically conferred upon it."), cert. denied, 281 U.S. 720 (1930). These authorities demonstrate that Congress has the authority to enact general criminal legislation incident to its specifically enumerated powers.

As to the more specific question, we conclude that §666 is a means plainly adapted, i.e., rationally related, to achieving the efficacious expenditure of federal funds and is, therefore, a law necessary and proper to the execution of the spending power. In M'Culloch, Chief Justice Marshall determined that "necessary" had an expansive meaning. The Clause does not restrain Congress's choice of means to only those means that are absolutely or indispensably necessary to the exercise of its powers. Rather, the Necessary and Proper Clause allows Congress to exercise its discretion in choosing particular means that may not be "necessary" in the strict sense of the word, but instead are convenient or conducive to the exercise of its powers. The Legal Tender Cases, 110 U.S. 421, 441 (1884) ("Where various systems might be adopted . . ., it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."); M'Culloch, 17 U.S. at 420. Thus, Chief Justice Marshall, relying on his expansive interpretation of "necessary," concluded that the power to establish post offices and post roads included the power to establish criminal penalties for interfering with the mail. Likewise, he concluded that the federal government could incorporate a National Bank even though that power is not enumerated in Article I. Chief Justice Marshall concluded that these so called "implied powers" were constitutional exercises of the sovereign power because each reasonably advanced an enumerated power. M'Culloch thus teaches us that Congress may use means which are unspecified in the

text of the constitution to achieve enumerated ends where there is a rational relationship between the means and the ends. Here, we know the end is the efficacious disbursement of federal funds. To determine whether §666 is rationally related to that end we must look to Congress's intent in passing the law and the specific mechanisms by which §666 hopes to achieve the desired end.

As we have discussed above, §666 was designed to protect the integrity of the vast sums of federal monies disbursed through federal programs. Section 666 could have been more narrowly crafted to more directly advance this goal, for example, by criminalizing the theft of the federal funds themselves while in the hands of the recipient or by requiring a direct nexus between the offense conduct and a federal program, but "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality to perform its function." Yakus v. United States, 321 U. S. 414, 425 (1944) (internal quotation and alteration omitted). Here, Congress has made a determination that the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds. As discussed in Part II, a more limited statutory scheme was rendered toothless because of the difficulty of tracing federal funds once they had been disbursed. In addition, we note that "money is fungible and its effect transcends program boundaries." Grossi, 143 F.3d at 350. The maladministration of funds in one part of an agency can affect the allocation of funds, whether federal or local in origin, throughout an entire agency. Thus, to suggest that corruption involving a discrete department or section of an agency that does not itself receive federal funds or administer a federal program can have no effect on the integrity or efficacy of a federal program is to ignore the fact that money is fungible and that federal funds are often comingled with funds from other sources. Section 666 addresses this problem

by policing the integrity of the entire organization that receives federal benefits. In sustaining the constitutionality of §666 under the Necessary and Proper Clause, the Eleventh Circuit recently has come to the same conclusion. See Edgar, 304 F.3d at 1327 ("It is reasonable for Congress to conclude that any corruption of such recipient organizations, regardless of whether the corruption involves the misappropriation of specifically federal funds, endangers the comprehensive programs in which the organizations participate, and thus the effective exercise of the Congressional spending power as well.").

The Court has approved this type of indirect enforcement mechanism in another context. In Westfall v. United States, 274 U.S. 256 (1927), the Supreme Court affirmed the constitutionality of the Federal Reserve Act, 38 Stat. 259, as amended, 40 Stat. 232, which made it a crime to misapply the funds of a State bank that was a member of the Federal Reserve System. The reasoning of the Court is persuasive on the issue presented in this case:

> The argument is that Congress has no power to punish offences against the property rights of State banks. It is said that the statute is so broad that it covers such offenses when they could not result in any loss to the Federal Reserve Banks. . . . [I]f a State bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. . . . That there is such a System and that the Reserve Banks are interested in the solvency and financial condition of the members also is too obvious to require a repetition of the careful analysis presented by the Solicitor General. The only suggestion that may deserve a word is that the statute applies indifferently whether there is a loss to the

> Reserve Banks or not. But every fraud like the one before us weakens the member bank and therefore weakens the System. Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.

Id. at 258-59 (internal citations omitted). As in Westfall, the government here has an interest in ensuring that the system of subnational agencies that administer federal funds remains strong even where there is not a direct loss to the federal funds themselves. Congress could well have determined that an agency official who is willing to take a bribe in the disbursements of nonfederal program money is not a person who should be entrusted with federal program funds either.

Any concern that we may have had regarding the scope of this law is allayed by the statute itself. The statute is self-limiting to ensure that "federal regulatory power [does not] tag along after federal money like a hungry dog." Morgan, 230 F.3d at 1074 (Bye, J., concurring) (internal quotations and emphasis omitted). Section 666(b) is a jurisdictional provision that ensures in each particular case that the federal power will be exercised only where the federal government has a substantial interest at stake and where substantial federal funds may be at risk. See Fischer, 529 U.S. at 689 n.3 (Thomas, J., dissenting) ("Title 18 U.S.C. §666(b) is, after all, a jurisdictional provision that allows federal prosecution only if the specific organization at issue received more than $10,000 in 'benefits.'"), id. at 690 n.3 ("Without a jurisdiction provision that would ensure that in each case the exercise of federal power is related to the federal interest in a federal program, §666 would criminalize routine acts of fraud or bribery."). The $10,000 threshold requirement and the $5000 transactional requirement create a sufficient nexus between the offense conduct and federal funds to ensure that federal

power will not be extended to the prosecution of merely local matters that may not jeopardize in any significant manner the integrity of federal programs.

More importantly, were we to conclude that Congress lacked the authority to legislate in this area, then the protection of federal funds would be left to the whim of state and local officials-perhaps even the same officials who pose a threat to the integrity of the federal funds in the first place and who therefore possess a strong disincentive to protect them. The proposition that the federal government is powerless to vindicate its own interests is clearly untenable:

> "The government of the Union, though limited in its powers, is supreme within its sphere of action. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

Logan v. United States, 144 U.S. 263, 283 (1892), quoting M'Culloch, 17 U.S. at 424. We reject it.

Accordingly, we hold that §666 is a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States.

IV.

To the extent that the district court held that 18 U.S.C. §666 requires no nexus between the offense conduct and federal funds beyond that required in subsection (b), the judgment of the district court is affirmed. We reverse that part of the district court's judgment finding §666 is facially unconstitutional. We remand this case to the district court for reinstatement of the indictment and for such further proceedings not inconsistent with this opinion.

BYE, Circuit Judge, dissenting.

No one doubts the constitutional authority of Congress to enact criminal laws punishing behavior affecting tangible federal interests. However, when Congress seeks to punish conduct with no connection to federal interests, conduct traditionally punished only by state and local governments exercising their general police powers, Congress exceeds its constitutional authority. The statute we review today, 18 U.S.C. §666(a)(2), punishes a broad swath of conduct bearing little relationship to any federal interest. It establishes federal criminal liability for those who bribe state and local government officials, provided only that the government receives $10,000 per year in federal program benefits. Id. §666(a)(2), 666(b): A briber need not handle, manage, administer or supervise the receipt or disbursement of federal funds, and the purpose of the bribe need not relate to federal program benefits. It is therefore logically and legally untenable to assert a federal interest in punishing these bribers.

In my view, the majority's decision to uphold §666(a)(2) despite this infirmity swims against the tide of governing law. A wave of recent Supreme Court decisions emphasizes

Congress' limited ability to federalize criminal conduct, United States v. Morrison, 529 U.S. 598 (2000), United States v. Lopez, 514 U.S. 549 (1995), and to interfere in matters traditionally left to state governance, Alden v. Maine, 527 U.S. 706 (1999), Printz v. United States, 521 U.S. 898 (1997). These decisions guide my review of §666(a)(2) and require my respectful dissent.

I

I do agree with the majority in one important respect: section 666(a)(2) cannot be justified solely as an exercise of Congress' Spending Clause authority. The majority properly rests this holding upon the absence of any statutory link between the bribe and the state or local government's receipt or use of federal benefits. Because §666(a)(2) does not link the bribe to federal benefits, the statute encompasses and punishes conduct well beyond Congress' ability to "provide for the . . . general Welfare of the United States." U.S. Const. Art. I, §8, cl. 1. Indeed, the statute's breadth leads to absurd results: only by injecting a new element into the statute can a court forestall the conviction of a person who bribes the city meat inspector while the city parks department receives $10,000 in federal benefits. See United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999). The majority wisely rejects the supposed Spending Clause moorings of §666(a)(2).

Had the majority stopped at this point, I would have joined its opinion. The majority continues onward, however, reaching beyond its Spending Clause analysis and "resort[ing] to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." Printz, 521 U.S. at 923. The majority apparently casts aside its earlier qualm that §666(a)(2) requires no connection between the bribe and federal benefits. The majority instead perceives a bare, "rational relationship" between punishing

bribers and maintaining the integrity of federal programs, and on that basis declares the Necessary and Proper Clause a proper font of congressional authority. This may be correct, but it answers only half the question we must decide.

II

In my view, the principal defect in the majority opinion is its inattention to the conjunctive "and" that separates the words "necessary and proper." The majority advances several arguments suggesting §666(a)(2) is "necessary," in the sense envisioned in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21 (1819). But the majority fails to ask-let alone resolve-whether the statute is also "proper." This is not merely a semantic dispute, for in Printz and Alden the Supreme Court advanced an interpretation of "proper" that calls into question the constitutionality of federal statutes that trespass upon the domain of state and local legislative power. Section 666(x)(2) is one such statute.

M'Culloch holds that Congress enjoys broad powers to select the means of enacting its objectives. Id. at 421. Thus, in determining whether a law is "necessary," courts must review Congress' law-making efforts with considerable deference. The majority describes this deference in terms of rationality: courts may not demand of Congress anything more than a rational relationship between its chosen means and ends. This reading of M'Culloch is, of course, received wisdom. Applying M'Culloch in this fashion, the majority makes a fairly convincing argument that the "fit" between §666(a)(2) and Congress' underlying objective to preserve the integrity of federal programs is rational. However, because there is a rational relationship between Congress' aim and the law it enacted, under M'Culloch, the law is "necessary." But M'Culloch says very little, if anything, about what makes a

law "proper." That specific question largely evaded the Court's. attention until Printz and Alden.

Printz began bridging this doctrinal gap by drawing upon a law review article that develops a legal and historical distinction between "necessary" laws and "proper" ones. Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993). Printz rejected the argument that Congress could commandeer state officials to implement certain federal mandates by using its Necessary and Proper Clause power to effectuate its Commerce Clause authority. 521 U.S. at 923-24. Relying solely on its understanding of what constitutes a "proper" law, the Court held the Necessary and Proper Clause forbids Congress from enacting legislation that intrudes on state sovereignty.

> When a "La[w]...for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in [the Constitution,] it is not a "La[w]...proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."

Id. (emphasis in original; internal citations omitted). Like Printz, Alden recognized the word "proper" restricts the scope of legislative power. Alden continued the Court's analysis of "proper" laws by rejecting the argument that the Necessary and Proper Clause conferred authority on Congress to subject unconsenting states to suit in state court "as a means of achieving objectives otherwise within the scope of the enumerated powers." 527 U.S. at 732.

The Court's analysis in Printz and Alden rested entirely upon the propriety of a statute, not whether that statute was

necessary. A law is "proper," the Court maintained, if it respects both the Constitution's limits on federal power and its grants of power to the states and the people. Printz, 521 U.S. at 918-22, 923-24. These cases teach us that a law is "proper" for the enforcement of an enumerated power only if it hews to constitutional principles of limited federal government and state sovereignty. Federal laws that usurp the traditional domain of state authority are therefore not "proper."

I believe §666(a)(2) lies outside the guideposts erected in Printz and Alden for assessing a "proper" law. The statute intrudes upon state and local concerns by federalizing anticorruption law, which is traditionally the domain of state and local legislation. See United States v. Bass, 404 U.S. 336, 349 (1971) ("Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.") (internal citations omitted) (cited in Lopez, 514 U.S. at 561 n.3). Section 666(a)(2) thereby offends the Constitution's basic limitations on federal power. The only possible relationship between §666(a)(2) and federal interests is the sum of $10,000 in federal benefits received each year by state or local governments. There is scarcely any limit to this relationship, however. Even under a narrow view of "federal benefits," Fischer v. United States, 529 U.S. 667, 681(2000), it is beyond dispute that every state-and nearly every county, tribe and city-receives that sum in yearly federal benefits. Moreover, the statute requires no connection between those federal benefits and the bribe. The lack of any connection makes all too real the risk that federal

anticorruption efforts will swamp state and local efforts to combat bribery.

The majority suggests the federal interest in punishing bribery of state and local government officials is at least as great as the federal interest in punishing those who misapply funds belonging to state banks. Westfall v. United States, 274 U.S. 256, 258-59 (1927). But the statute in Westfall included an element establishing a federal interest in every prosecution-the state bank had to be a member of the Federal Reserve System. Misapplication of a bank's funds weakened the entire membership of the Reserve, so the Supreme Court could easily identify the federal interest in protecting each bank's assets. Westfall therefore adds nothing to the majority's argument. If anything, Westfall proves my point: Congress cannot enact criminal laws absent a quantifiable federal interest in punishment.

Both the majority and the Eleventh Circuit in United States v. Edgar, 304 F.3d 1320, 1326 (11th Cir. 2002), sanction this federalization of anticorruption law. They all but admit that once the federal government provides $10,000 in yearly benefits to a state or local government, the federal government obtains an ongoing interest in the entire structure and operations of state and local governments, and in the credibility and integrity of their agents. Congress may, in effect, regulate (in this case, criminalize) many activities that tangentially threaten that structure, credibility or integrity. The real-world effects are truly startling. It is now a federal crime for an auto mechanic to induce a public high school principal to hire him to teach shop class by offering free car repair. This federalization of anticorruption law erodes the Constitution's limits on federal power.

The majority's sweeping view of the Necessary and Proper Clause calls to mind Congress' unbounded

deployment of its Commerce Clause authority before Lopez and Morrison. Both Lopez and Morrison curtailed federal power, forbidding Congress from piling "inference upon inference" to demonstrate a relationship between crimes and federal interests. Lopez, 514 U.S. at 566; Morrison, 529 U.S. at 615. I fear Congress relied upon similarly weak and attenuated inferences in enacting §666(a)(2). For many of the same concerns articulated in Lopez and Morrison, I am troubled by the majority's efforts to interpret the Necessary and Proper Clause to permit the federalization of criminal laws. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." Lopez, 514 U.S. at 577. This is precisely what makes §666(a)(2) not "proper."

I recognize, of course, §666(a)(2) does not preempt state or local power to punish corruption. Even though §666(a)(2) lacks preemptive effect, the sheer size and funding of the federal government's criminal justice machinery suggests the possibility of state and local anticorruption efforts dwindling. It blinks at reality to believe §666(a)(2) does no more than provide an additional weapon in the anticorruption arsenal. By inserting itself into a domain traditionally reserved for state and local prosecutions, the federal government treats state governments, for example, not with the respect and dignity due them as "residuary sovereigns and joint participants in the Nation's governance," Alden, 527 U.S. at 748-49, but as untrustworthy organs incapable of policing their own. The development and enforcement of sound ethical standards, and of political accountability to citizens for failing to do so, lies at the very heart of sovereignty. See Printz, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to

its own citizens."); New York v. United States, 505 U.S. 144, 168-69 (1992).

Section 666(a)(2) upsets the delicate balance between federal and state authority that animates our Constitution. See id. at 921; Alden, 527 U.S. at 751. "Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. . . . The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog." United States v. Morgan, 230 F.3d 1067,1074 (8th Cir. 2000) (Bye, J., specially concurring) (quoting David E. Engdahl, The Spending Power, 44 Duke L.J. 1, 92 (1994)).

III

I do not believe §666(a)(2) validly "carr[ies] into [e]xecution" Congress' Spending Clause authority because the statute sweeps within its ambit a wide range of criminal activity bearing little or no relation to federal interests. I am not alone in this view. Even the government disavowed reliance on the Necessary and Proper Clause when the question first arose at oral argument. The government never urged our court to uphold §666(a)(2) on the strength of Congress' Necessary and Proper Clause power, and, when pressed, the government expressed considerable discomfort with such a notion. For the reasons expressed above, I share the government's discomfort with this argument, and therefore respectfully dissent.

A true copy.
Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

Basim Omar Sabri,

Defendant.

Crim. No. 01-246 (RHK/JMM)
MEMORANDUM OPINION
AND ORDER

Michael W. Ward, Assistant United States Attorney, Minneapolis Minnesota for Plaintiff.

Andrew S. Birrell and R. Travis Snider, Birrell & Newmark, Ltd. Minneapolis, Minnesota, for Defendant.

Defendant Basim Omar Sabri is charged in a three-count Indictment[1] with corruptly giving, offering, and agreeing to give things of value to Minneapolis City Council member Brian Herron with the intent of rewarding or influencing Herron in connection with various transactions of the City Council and the Minneapolis Community Development Agency ("MCDA"), all in violation of 18 U.S.C. §666(a)(2). Before the Court is Sabri's Motion to Dismiss the Indictment on the grounds that 18 U.S.C. §666 is unconstitutional on its face. For the reasons set forth below, the Court will grant the Motion.

[1] Sabri has entered pleas of not guilty to each of the counts in the Indictment.

Background

The following facts are alleged in the Indictment. Defendant Sabri is a property developer and landlord in the City of Minneapolis. (Indictment, ¶ l.d.) During 2001, Sabri was pursuing a real estate development project within the Eighth Ward of the City of Minneapolis which involved a hotel and several commercial retail businesses. (Id.) The project contemplated zoning, eminent domain/condemnation, licensing and funding actions by the City of Minneapolis ("the City"), the MCDA and the Minneapolis Neighborhood Revitalization Program (NRP).[2] (Id.) Through July 17, 2001, Herron was a member of the Minneapolis City Council representing the Eighth Ward.[3] (Id. ¶ 1.e.) His committee assignments included the Ways and Means/ Budget, Public Safety and Regulatory Services, and Health and Human Services committees. (Id.) As a member of the City Council, Herron also served as a member of the Board of Commissioners of the MCDA, overseeing the actions and budget of that agency.[4] (Id.)

Count I of the Indictment alleges that, from July 2 through July 17, 2001, Sabri corruptly sought Herron's assistance in obtaining regulatory approvals from the City of Minneapolis for the above-described commercial real estate development project. (Id. ¶ 3.) Sabri allegedly gave or offered Herron $5,000 with the intent to influence or reward him in connection with such transactions. (Id.)

Count II of the Indictment alleges that, from July 2 through July 17, 2001, Sabri corruptly sought Herron's attendance at a meeting with private business owners who owned property necessary for Sabri's commercial development project. (Id. ¶ 5.) Count II also alleges that Sabri corruptly sought Herron's threat at that meeting to use the City's power of eminent domain to take the business owners' property unless they sold to Sabri. (Id.) Sabri allegedly offered or agreed to give Herron $10,000 with the intent of influencing or rewarding Herron for his actions. (Id.)

Count III of the indictment alleges that from July 7 through July 17, 2001, Sabri corruptly sought Herron's assistance in obtaining $800,000 in community economic development grants from the City, the MCDA, and other entities for his commercial real estate development project. (Ld. ¶ 7.) Sabri allegedly offered or agreed to give Herron

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[2] The NRP is an entity formed by the City of Minneapolis and other local governmental entities to provide funding for the economic revitalization of Minneapolis neighborhoods through neighborhood steering committees. The NRP is wholly funded by the MCDA and its affairs are managed by the NRP Policy Board, which includes the Mayor of the City of Minneapolis and members of the Minneapolis City Council. (Indictment ¶ l.c.)

[3] On July 17, 2001, Herron entered a plea of guilty to one count of Extortion Under Color of Official Right in violation of 18 U.S.C. §1951. The conduct underlying the charge to which Herron pleaded guilty involved a different transaction and different individuals than are involved in the Indictment here, and nothing in this Memorandum Opinion and Order affects the validity of the charge against Herron or his plea of guilty. See United States v. Von, 171 F.3d 648, 654 (8th Cir. 1999) (rejecting challenge to constitutionality of 18 U.S.C. §1951).

[4] The MCDA has an Executive Director, appointed by the Mayor of the City of Minneapolis, and is governed by a Board of Commissioners that is composed of the thirteen elected members of the Minneapolis City Council. (Indictment ¶ 1 .b.)

$80,000 (a 10% commission) with the intent of influencing or rewarding Herron in connection with his assistance. (Id.)

During the one-year period beginning January 1, 2001, the City of Minneapolis was expected to receive (and the City Council was expected to administer) approximately $28.8 million in federal assistance. (Id. ¶ 1.a.) During that same one-year period the MCDA was expected to receive and administer federal assistance in the form of Community Development Block Grants and other federal programs of approximately $23 million. (Id. ¶ 1.b.)

Analysis

As noted above, all three counts of the Indictment charge Sabri with violating 18 U.S.C. §666(a)(2). That section provides, in relevant part, that if a local government, or any agency thereof, "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," see 18 U.S.C. §666(b), then it is a crime against the United States for any person to

> corruptly give[], offer[], or agree[] to give anything of value to any person give with intent to influence or reward an agent of ... a ... local government or any agency thereof, in connection with any business, transaction, or series of transactions of such ... government, or agency involving, anything of value of $5,000 or more.,

18 U.S.C. §666(a)(2).

Sabri argues that the federal statute is unconstitutional on its face because it does not require a connection between the alleged criminal conduct -- the giving or offering of a bribe -- and the federal funds distributed by Congress. Without the requirement of such a connection, Sabri contends, the statute lies outside the scope of Congress's authority to enact laws under the Spending Clause of Article I of the United States Constitution. This Court begins its analysis by construing §666(a)(2) to determine whether it does or does not require a connection between the bribe and the expenditure of federal funds. If the statute does not require such a connection, the Court will then consider whether Congress validly exercised its legislative authority in enacting §666(a)(2).

I. The Essential Elements of Giving, Offering or Agreeing to Give A Bribe in Violation of §666(a)(2)

In Salinas v. United States, 522 U.S. 52, 56-57 (1997), the United States Supreme Court construed the complementary provision of § 666 which makes it a federal offense for an agent of an organization or a state, local, or tribal governmental body or agency that receives more than $10,040 in federal funds in a year to solicit, demand, accept, or agree to accept anything of value with the intent to be influenced or rewarded in connection with any business, transaction, or series of transactions of the entity valued at $5,000 or more. 18 U.S.C. §666(a)(1). Given the parallel wording in the provision criminalizing the taking of a bribe (18 U.S.C. §666(a)(1)(B) and in the provision criminalizing the giving or offering of a bribe (18 U.S.C. § 666(a)(2)), this Court first looks to Salinas for guidance in construing §666(a)(2).

Salinas, a deputy sheriff in Hidalgo County, Texas, was responsible for managing the county jail and supervising the custody of prisoners. 522 U.S. at 55. He accepted bribes from

a federal prisoner housed at the jail pursuant to an arrangement negotiated between the United States Marshals' Service and the county; in exchange for the bribes, the prisoner was permitted "contact visits" with his wife and a girlfriend. Id. Salinas argued to the Supreme Court that, under §666(a)(1)(B) the government must prove, as an element of the crime of taking a bribe, that "the bribe in some way affected federal funds, for instance by diverting or misappropriating them." Id.

In evaluating Salinas' argument, the Supreme Court focused on the clause "[a]ny business, transaction, or series of transactions," which is found both in §666(a)(1)(B) and in §666(a)(2). Reasoning that the word "any" means "any," without qualification, and that "[t]he statute applies to all cases in which an 'organization, government, or agency' receives [$10,000 or more] of benefits under a federal program," id. at 57 (emphasis added) (citing 18 U.S.C. §666(b)), the Court rejected Salinas' proposed statutory construction. The statute's prohibition against accepting a bribe with the intent of being influenced or rewarded in connection with any business transaction or series of transactions "is not confined to a business or transaction that affects federal funds." Id. Indeed, the Supreme Court observed that §666 (a)(1)(B)'s language was "expansive" and "unqualified. . . both as to the bribes forbidden and the entities covered." Id. at 56 (emphasis added).

Also rejected was Salinas' contention that the Supreme Court could not construe §666(a)(1)(B) to apply to bribes having no affect on federal funds without "a plain statement of congressional intent," as required by Gregory v. Ashcroft, 501 U.S. 452 (1991), and McNally v. United States, 483 U.S. 350 (1987). The Supreme Court distinguished Gregory and McNally on the grounds that, "[i]n each of those cases we confronted a statute susceptible of two plausible

interpretations one of which would have altered the existing balance of federal and state power." 522 U.S. at 59. Here, however, "[t]he text of §666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction." Id. at 60 (emphasis added). Accordingly, the Supreme Court held that "as a matter of statutory construction, §666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds." Id. at 61 (emphasis added).

It appears that Salinas did not ask the Supreme Court to address whether §666(a), as construed, was a proper exercise of the legislative powers vested in Congress by Article I of the Constitution. The Supreme Court did decide, however, that the statute was constitutional as applied to the facts of the case. In reaching that conclusion, it observed that the "preferential treatment accorded to [a federal prisoner in the county jail] was a threat to the integrity and proper operation of the federal program." Id. at 60-61.

While the Salinas Court held that §666(a)(1)(B) did not "require the Government to prove that the bribe in question had any particular influence on federal funds," id. at 61, it expressly left open the question of "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." Id. at 59. After Salinas, two federal courts of appeal have concluded that there must be proof of a connection between the bribe and the expenditure of federal funds.[5] This Court evaluates each appellate court decision in turn.

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[5] By contrast, the United States Court of Appeals for the Sixth Circuit held that §666 "requires no relationship between the illegal activity and the federal funding." See United States v. Dakota, 197 F.3d 821, 826 (6th Cir. 1999). In reaching this

The Second Circuit Court of Appeals in
United States v. Santpietro

In United States v. Santopietro, 166 F.3d 88 (2d Cir. 1999), cert. denied, 510 U.S. 1092 (1994), the Government appealed from a revised sentence that the district court had imposed on Santopietro after vacating his conviction for crimes charged under §666. Santopietro, 166 F.3d at 90. Santopietro, formerly the Mayor of Waterbury, Connecticut had been charged with violating §666(a)(1)(B) by engaging in "a scheme whereby [he] used his political position to influence decisions by various city agencies in return for bank loans and cash payoffs from certain local businessmen." Id. at 91. Santopietro used his influence to further the interests of various real estate developers and accepted both rewards for having used his influence and inducements to use his influence. Id. During the operation of this scheme, the City of Waterbury received substantial federal funds for housing, urban development and other programs within the purview of the land use board, the water department, the zoning commission, and the fire marshal. Id. at 93. "Although large amounts of money flowed to individuals through corrupt means, there was no obvious or direct financial loss to the City of Waterbury itself." Id. at 91.

Prior to the Supreme Court's decision in Salinas, the Second Circuit had held that "the $5,000 or more required to be involved in the transaction must be worth at least that amount to a recipient of federal funds." United States v. Foley, 73 F.3d 484, 492-93 (2d Cir. 1996). The Santopietro court acknowledged that, in light of Salinas,

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conclusion however, the Sixth Circuit did not engage in any extended analysis of either the statute or the Salinas decision.

> to whatever extent Foley required that the bribe directly affect the disbursement or other use of federal funds, such a construction of the statute must now be discarded. Equally to be cast aside is a construction of the statute that imposes limitations on the "anything-of-value" element, beyond the requirement that the transaction, in connection with which the accepter of corrupt payments intended to be influenced, involves anything of value of $5000 or more. Thus, to the extent that Foley required the Government to plead and prove that the transaction involved something of value to the governmental entity that received the requisite amount of federal funds, that narrowing construction of the statute must also be discarded.

166 F.3d at 92-93 (emphasis in original).

Evaluating whether Santopietro's conviction under 666(a)(1) was permissible after the Supreme Court's decision in Salinas, the Second Circuit first discussed the statutory requirements of the offense: the court of appeals observed that the City of Waterbury had received more than $10,000 in the relevant years and the corrupt transactions had exceeded $5000 in value. It then evaluated a "requirement of Foley" that it concluded had survived the Supreme Court's holding in Salinas "that the transaction sought to be influenced had some connection with a federal program." Id. at 93 (citing Foley, 73 F.3d at 493). In considering this "requirement" -- based on its own prior decision in Foley rather than the text of the statute -- the Second Circuit reasoned that [i]ndeed, Salinas may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied." Id. Applying this "requirement" from Foley, the Second Circuit found that because

> federal funds were received by Waterbury for housing and urban development programs and the corrupt payments concerned real estate transactions within the purview of the agencies administering federal funds, the requisite connection between the bribes and the integrity of federally funded programs is satisfied.

166 F.3d at 93.

The Third Circuit Court of Appeals in United States v. Zwick

In United States v. Zwick,199 F.3d 672 (3d Cir. 1999), the defendant, an elected member of a township board of commissioners, appealed from his conviction or bribery under §666(a)(1)(B). Zwick, 199 F.3d at 675. Zwick argued that the trial court misinterpreted §666 when it upheld his conviction without proof of a connection between the solicitation and taking of bribes and federal funds or programs. Id. at 675-76.

Before analyzing the issue raised by Zwick on appeal, the Third Circuit reviewed the case law that had developed around §666.

> Prior to the enactment of §666 in 1984, the limited scope of the federal bribery statute and general theft of property statute hampered the federal government's efforts to reach crimes affecting federal interests due to tracing requirements and limitations on application to non-federal employees. See 18 U.S.C. §§201, 641. By its terms, §666 fills these particular voids; it imposes no title or tracing requirements and covers non-federal employees.

Id. at 679 (emphasis added). With respect to the case law construing §666 prior to Salinas, the court of appeals: observed that some courts had been reluctant to uphold convictions under §666 where there was no proof of a federal

interest in the corrupt act; these courts had reasoned that "interpreting §666 to have no federal interest requirement would make a federal offense out of routine local bribery, dramatically changing the state-federal balance without an express Congressional directive that it intended to do so." Id. at 680. After reviewing the Salinas decision, the Third Circuit discussed the post Salinas split in authority that had emerged regarding whether the government must prove, in a prosecution under §666, that a federal interest was implicated by the corrupt acts. Id. at 681-82.

The Third Circuit began its analysis with the statutory language itself and concluded that "[t]he language does not state explicitly that the government must show a connection between the bribe and federal interests." Id. at 682. Finding no requirement of such a connection in the plain language of §666(a)(1)(B), the Third Circuit turned to the statute's title -- "Theft or bribery concerning programs receiving Federal funds"-- finding that the title "implies that a federal connection is anticipated." Id. The Third Circuit thus concluded that §666(a)(1)(B) was ambiguous, presenting two alternative interpretations:

> The most literal interpretation -- that the statute lacks a federal connection requirement -- is troubling from an interpretative standpoint in that it broadens the range of activity criminalized by the statute and alters the existing balance of federal and state powers by encompassing acts already addressed under state law in which the federal government may have little interest. We cannot embrace such a-. broad reading of this criminal law unless that is the clear directive from Congress.

Id. at 682-83. The Zwick court therefore turned to the legislative history for guidance as to Congress's intent and

concluded that Congress did not intend "to make §666 applicable when no federal interest is implicated by certain offense conduct." Id. at 686. Before reaching its holding "that §666 requires that the government prove a federal interest is implicated by the defendant's offense conduct," id. at 687, the Third Circuit observed that

> [i]nterpreting §666 to have no federal interest requirement produces serious concerns as to whether Congress exceeded its power under the Spending Clause in enacting this statute. To pass muster under the Spending Clause, legislation regulating behavior of entities receiving federal funds must, among other things, be based upon a federal interest in the particular conduct. Applying §666 to offense conduct, absent evidence of any federal interest would appear to be an unconstitutional exercise of power under the Spending Clause.

Id. at 687 (internal citations omitted). The Third Circuit therefore justified its holding on the grounds that, "when a statute is unclear, we will construe it so as to avoid constitutional concerns, assuming that such construction does not amount to a rewriting of the statute." Id.

> ***The essential elements of the crime defined in §666(a)(2) do not include proof of a connection between the offense conduct and the expenditure of federal funds.***

The Eighth Circuit Court of Appeals has not addressed whether a prosecution under §666 requires proof of a connection between the giving or taking of bribes and the federal government's expenditure of funds and, if so, the nature of that connection. Judge Kermit Bye, however, recently considered the Zwick and Santopietro opinions and

found the approach taken by those courts to be "fundamentally flawed." United States v. Morgan, 230 F.3d 1067, 1072-73 (8th Cir. 2000) (Bye, J., concurring). The Second and Third Circuits clearly sought to avoid the constitutional problems they perceived with what the Supreme Court had described as §666's "expansive, unqualified language, both as to the bribes forbidden and the entities covered." Salinas, 522 U.S. at 56. Judge Bye described the Zwick and Santopietro opinions as "reading into" the text of §666 the requirement of a "connection" not found in the language of the statute itself. Morgan, 230 F.3d at 1073. He further observed that the actions of the Second and Third Circuits are contrary to the Supreme Court's repeated admonitions that

> [c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.

Id. (quoting United States v. Albertini, 472 U.S. 675, 680 (1985) which is quoted in Salinas, 522 U.S. at 57 & 59-60). Judge Bye's analysis and criticisms of Zwick and Santopietro are well-founded.

The Salinas Court admonished that "[n]o rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope." Salinas, 522 U.S. at 59 (quoting United States v. Raynor, 302 U.S. 540, 552 (1938)). That, however,

is precisely what the courts of appeals in Zwick and Santopietro did. The Third Circuit in Zwick focused on the statute's title to find an ambiguity that would justify using §666's legislative history to fashion a connection requirement for the statute, which is silent in that regard.[6] This approach fails to take into account a long-standing principle of statutory construction that a title cannot control the plain words of the statute.[7] See 2A J.G. Sutherland, Statutes and Statutory Construction §47.03 (1st ed. 1891). The Third Circuit also sidestepped the Salinas Court's conclusions that the clause "any business, transaction, or series of transactions" is unambiguous, and the term "any" is without limitation. Furthermore, the court of appeals in Zwick did not address the fact that the text of §666(a)(1)(B) does not mention programs of an organization, state, local, or tribal government, or governmental agency that receive federal funding. The only limitation on the statute's application, set out in §666(b), is that the entity whose business the bribe was intended to influence must receive more than $10,000 in a year from a federal program. Under Salinas §666(a)(1)(B) cannot be restricted to bribes tending to influence the "business, transaction, or series of transactions" of programs receiving federal funding. The Third Circuit's reading of §666(a)(1)(B) strains the plain meaning of the words and excludes from the scope of the statute conduct that clearly falls within it.

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[6] The Supreme Court in Salinas, while briefly discussing the historical context surrounding the enactment of §666, did not rely upon the legislative history to construe the statute.

[7] This Court further notes that the Supreme Court, in Salinas, did not consider the title of §666 in construing the statute. It focused solely on the text of §666(a)(1)(B) and found the relevant language to be unambiguous.

The Second Circuit in Santopietro derived its "connection" requirement -specifically, that the transaction to be influenced have some connection with a federal program -- from its pre-Salinas holding in United States v. Foley. The Second Circuit also focused on the fact that the Salinas Court had indicated that the offense conduct there, the bribes received by the deputy sheriff from the federal prisoner, had posed a "threat to the integrity and proper operation of a federal program." It thereby avoided the question of

> whether Santopietro's role as mayor --the chief executive officer of the city and hence the officer ultimately responsible for all city departments -- would render the statute applicable to corrupt payments received by him for an transaction involving the city, even though the federal funds were received for a program entirely unrelated to the program in connection with which the corrupt payments were made.

Santopietro, 166 F.3d at 94 n.3 (emphasis added). This footnote again does not account for the fact that the Salinas Court had construed the clause "any business transaction or series of transactions" to be unqualified. Indeed, according to the Supreme Court, "[]the statute applies to all cases in which an 'organization, government, or agency' receives [$10,000 or more] of benefits under a federal program." Salinas, 522 U.S. at 57 (emphasis added). Section 666(a)(1)(B), as construed by Salinas, applied to Mayor Santopietro for bribes tending to influence any transaction of City of Waterbury, so long as the city received $10,000 or more of benefits under a federal program. Recognizing that such a reading would present constitutional problems, however, the Second Circuit read into the statute a "connection" requirement not found in the text itself.

This Court is not persuaded by these two appellate court decisions, which read a "connection" requirement into the essential elements of a charge under §666. The text of §666(a)(2) cannot support the existence of a "connection" requirement as one of the elements of the offense without qualifying the word "any" in the phrase "in connection with any business, transaction, or series of transactions" -- a phrase the Supreme Court has determined to be unqualified and unambiguous. Therefore, the essential elements the government must prove in order to convict a defendant of giving, offering or agreeing to give a bribe to influence an agent of an organization, government, or governmental agency in violation of §666(a)(2) are as follows:[8]

1. The defendant offered or gave a thing of value to another person;

2. The thing of value was offered or given in connection with any business, transaction, or series of transactions of an organization, or of a local government, or any agency thereof;

3. The business, transaction, or series of transactions in question involves something valued at $5000 or more;

4. The defendant intended the thing of value to influence or reward an agent of such organization, government, or governmental agency in connection with the business, transaction, or series of transactions in question; and

[8] These elements of the offense are consistent with the proposed jury instructions submitted by the government for use in this case. See also Eighth Circuit Model Criminal Jury Instruction 6.18.666B and 6.18.666C (2002)

5. The organization, government, or governmental agency in question received, in any one year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance.

Because §666(a)(2) does not require the government to prove a connection between the offense conduct and the expenditure of federal funds,[9] the remaining issue is whether the statute, as now construed by this Court, is a constitutional exercise of Congress's powers under the Spending Clause.

II. The Constitutionality of §666(a)(2) under the Spending Clause

Federal courts are courts of limited jurisdiction, possessing only such powers as are authorized by the Constitution and by Acts of Congress. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). The power of Congress to enact legislation is limited to the enumerated powers found in Article I of the Constitution. See generally New York v. United States, 505 U.S. 144, 1158-59 (1992) (discussing constitutional limitations on Congress's power to legislate). The Spending Clause in Article I authorizes Congress to spend federal funds "to provide for the general Welfare of the United States." U.S. Const. Art. I, §8, cl. 1. The government argues that (a) the statute itself, in §666(b), confers federal jurisdiction for prosecution and (b)

[9] Therefore, the government's argument in its opposition memorandum that it could establish a connection between the bribes allegedly offered by Sabri and the expenditure of federal funds is irrelevant. The statute does not require proof of such a connection in order for the government to establish that a crime, as defined in §666, has been committed.

Congress has properly enacted §666 under the Spending Clause.[10]

The government argues that §666(b) -- which states that the statute applies whenever an organization, state, local, or tribal government, or governmental agency in question has received at least $10,000 from a federal program -- constitutes an "express jurisdictional element" that confers federal court jurisdiction over the offenses described in §666.[11] See United States v. Lopez, 514 U.S. 549 561 (1995). In Lopez, the Supreme Court considered whether the Gun-Free School Zones Act of 1990 was unconstitutional because it had been enacted outside the scope of Congress's powers under the Commerce Clause. 514 U.S. 559-67. In determining the Act's constitutionality, the Court evaluated whether 18 U.S.C. §922(q) contained a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 561. The Supreme Court concluded that §922(q) had "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Id. at 562 (emphasis added).

Similarly, §666 does not require that the offense conduct (in this case, the giving or offering of bribes) have an effect on the federal funds disbursed to local government. Salinas, 522 U.S. at 60-61. There is no statutory element, as established above, that requires proof on a case-by-case basis that the alleged bribery has an explicit connection to any federal funds distributed to the receiving entity. The Third Circuit in Zwick correctly pointed out that §666 "imposes no title or tracing requirements." 199 F.3d at 679. Section 666 is plainly distinguishable from other criminal statutes containing an "express jurisdictional element"; section 666(b) does not directly link a defendant's wrongdoing to the subject over which Congress has power -- the expenditure of federal funds. See generally, George D. Brown, Stealth Statute - Corruption, the Spending Power, and the Rise of 18 U.S.C. §666, 73 Notre Dame L. Rev. 247, 293-94 (Jan. 1998). The Court rejects the government's argument that §666(b) is an "express jurisdictional element" that limits the statute's reach and constitutes a proper conferral of federal jurisdiction.

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[10] The government has not argued that Congress enacted §666 pursuant to the exercise of legislative power under the Commerce Clause; therefore, this Court will not consider that issue.

[11] The government's assertion that §666(b) limits the statute's applicability to "entities receiving a threshold amount of federal funding and to agents of those entities receiving federal funds," (Gov't Br. at 3-4), seriously mischaracterizes the statute. The criminal provisions of §666(a) are triggered whenever an organization, or a state, local, or tribal government, or any agency thereof, receives at least $10,000 in federal funds in a year. 18 U.S.C. §666(b). The statute applies, however, not only to agents of the entity receiving the funds, 18 U.S.C. §666(a)(1), but also as the Indictment in this case against Sabri demonstrates, to any person offering something of value with the intent of influencing or rewarding an agent of the entity receiving the federal funds in connection with any business of that entity. 18 U.S.C. §666(a)(2). Nor does §666(a)(2) require the agent to be the direct recipient of the bribe; under that provision, it is a crime to offer something of value to any other person with the intent of influencing or rewarding an agent of the entity receiving the government's funds.

The government also argues that, under South Dakota v. Dole, 483 U.S. 203 (1987), §666 is a valid exercise of legislative power under the Spending Clause because it is merely a "condition" which Congress may attach (incident to its spending power) on an entity's receipt of federal funds. In Dole, the Supreme Court held that Congress could indirectly bring about the establishment of a uniform minimum drinking age among the States by enacting a statute that directed the Secretary of Transportation to withhold a small percentage of federal highway funds from those States allowing the purchase or possession of alcohol by individuals under twenty-one years of age. 483 U.S. at 206. "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal. statutory and administrative directives." Id. The Dole Court recognized, however, that Congress's power under the Spending Clause is subject to several general restrictions, including limitations that (1) the power must be used in pursuit of the general welfare; (2) Congress must state the condition it is placing on the federal funding unambiguously; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions must not violate other independent constitutional restrictions. Id. at 207-08.

This Court finds unpersuasive the government's argument that Congress's enactment of §666 is justified under the standard announced in Dole. As a threshold matter, §666 is not really a "condition" statute. Congress clearly stated the conditions upon which States could receive all of the available federal highway funds. See Dole, 483 U.S. at 208 (citing 23 U.S.C. §158). Section 666, however, does not similarly condition a state or local government, or governmental agency's, receipt of federal funds. Section 666 "neither requires a state's compliance with federal regulatory

or administrative directives, nor prevents state action." United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y.1995). Furthermore, the statute does not apply to the recipient government or organization; it applies to the "agents" of the recipient and private parties.

The Supreme Court has long observed that congressional power under the Spending Clause is similar to the power existing between parties to a contract.

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

Pennhurst, 451 U.S. at 17. The government's contention that "[a] local government may easily remove its officers and agents from coverage under 18 U.S.C. §666 by simply declining any federal aid or only accepting de minimus aid" (Gov't's Br. at 7) would suggest that there is some sort of contractual quid pro quo supporting the enactment of §666 under the Spending Clause. The argument in fact demonstrates that §666 is an "unbargained-for" intrusion into state criminal jurisdiction.

In Dole, South Dakota stood to lose only "5% of the funds otherwise obtainable under specified highway grant programs" if it adhered to a minimum drinking age of nineteen. Dole, 483 U.S. at 211 (emphasis added). Given the small percentage of funds at stake, the Dole Court had found the state's arguments that the highway funding statute was "coercive" to be mere rhetoric. Id. The "choice" posed by the government here is much more dire. To cut the "string" of

§666, the City of Minneapolis must decide to forego approximately 99.97% of the federal funds[12] it otherwise obtains annually through federal programs.[133] Similarly, the MCDA must decide to forego approximately 99.96% of the federal funds[144] it otherwise obtains annually through federal programs in order to untangle itself from the "string" of §666. Thus, even if one could describe the federal funds disbursed to the City of Minneapolis and MCDA as the "financial inducement" by which Congress bargained for federal jurisdiction over offenses traditionally within the purview of state and local governments, that bargain surely is "so coercive as to pass the point at which pressure turns into compulsion." Dole, 483 U.S. at 211.

Section 666 plainly is not a "condition" statute within the reasoning of Dole and cannot be justified under that decision

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[12] That percentage represents all but $10,000 of the $28.8 million in federal funding the City received during calendar ear 2001. (See Indictment ¶ l. a.)

[13] Even if the City of Minneapolis or the MCDA made that "simple" decision such a course of action would not immediately remove anyone from the scope of §666; the "one year period" for determining whether the statutory minimum amount of federal funds have been received begins no earlier than twelve months before the commission of the offense and extends no later than twelve months after the commission of the offense. See 18 U.S.C. §666(d)(5). Thus, long after the federal funds had been cut off, the City. and the MCDA could still find both their "agents" and third parties subject to federal criminal prosecution.

[14] This percentage represents all but $10,000 of the $23 million in federal funds the MCDA allegedly received during calendar year 2001. (See Indictment ¶1. b.)

as a valid exercise of Congress's power under the Spending Clause.[15] Viewing §666 in light of Dole and Pennhurst, Judge Bye has observed that

> Congress did not contract with states or local governments. Neither did Congress bestow gifts of funds upon those governments. Rather, Congress passed a federal criminal statute designed to punish conduct that falls within the domain of traditional state concerns (bribery, embezzlement, fraud, etc.). Section 666 reaches beyond punishment of the state and local governments who receive those funds to proscribe the conduct of third persons who aren't parties to the funding contract.

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[15] If §666 were a condition statute, it would not appear to satisfy the relatedness limitation on legislative power under the Spending Clause. That limitation requires that the condition Congress imposes on the federal funds must bear some relationship to the purpose of the federal spending. See New York v. United States, 505 U.S.144, 167 (1992); Dole, 483 U.S. at 207-08. The government argues that the purpose of §666 is to protect the "integrity of organizations or agencies that receive federal funds." (Gov't Br. at 4.) Such a connection between the federal spending and the enactment of §666 is too attenuated since, under that rationale, the government could prosecute a city meat inspector for taking bribes of over $5000 (thereby compromising the integrity of city government) even if the inspector has no contact with or control over funds received by the city from the federal government.

Morgan, 230 F.3d at 1074 (emphasis added). This Court finds Judge Bye's observations about the Spending Clause shortcomings of §666 to be germane and persuasive.[16]

"Under our federal system, the states possess primary authority for defining and enforcing the criminal law." Lopez, 514 U.S. at 561 n.3 (internal quotation marks omitted). The Minnesota Legislature has declared it a felony to give, offer, or promise to give to any public officer or public employee,[17] either directly or indirectly, any benefit, reward, or consideration to which that officer or employee is not legally entitled with the intent of influencing that person's performance of his or her powers or duties. Minn. Stat. §609.42. The federal punishment of the same conduct under §666(a)(2) is an intrusion into the state's primary authority and is based solely upon a state or local governmental entity's receipt of a modest amount of federal funds. The following passage, quoted in Morgan, has resonance here:

[16] For purposes of Minnesota's bribery statute, a "public officer" is defined to include "a member of the legislature or of a governing board of a county, municipality, or other subdivisions of the state, or other governmental instrumentality within the state." Minn. Stat. §609.415, subd. l (1)(b). A "public employee" is defined as "a person employed by or acting for the state or a county, municipality, or other subdivision or governmental instrumentality of the state for the purpose of exercising their respective powers and performing their respective duties, and who is not a public officer." Id., subd. 1(2).

[17] The constitutional deficiencies this Memorandum Opinion and Order has discussed with respect to 18 U.S.C. §666(a)(2) have no application to Minnesota's bribery statute.

> . . . Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. Federal dominion over federal property is irrelevant, because once any particular funds have been given to a recipient, those funds are not federal property anymore. The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog.

Morgan, 230 F.3d at 1074 (quoting David E. Engdahl, The Spending Power, 44 Duke L.J. .1, 92 (Oct. 1994)) (emphasis added in concurring opinion). Without a requirement that the government prove that the alleged bribery has some connection to the federal funds disbursed by Congress, which this Court has determined is not present in the statute, 18 U.S.C. §666(a)(2) is an unconstitutional exercise of Congress's power under the Spending Clause. Accordingly, the Indictment here, based solely on §666(a)(2), must be dismissed.

Conclusion

Section 666(a)(2) does not require proof by the prosecution of a connection. between the offense conduct and the expenditure of federal funds. Section 666 does not contain an "express jurisdictional requirement" that limits the statute's reach to cases in which the alleged bribery has an explicit connection to any federal funds distributed to the receiving entity. Thus, it does not contain a proper conferral of federal jurisdiction, as discussed in United States v. Lopez, 514 U.S. 549 (1995). Nor does §666 impose a "condition" on the grant of federal funds, as discussed in South Dakota v. Dole, 483 U.S. 203 (1987). Therefore, §666(a)(2) is an unconstitutional exercise of Congress's legislative power under the Spending Clause of Article I of the United States Constitution.

Based on the foregoing, and all of the files, records and proceedings herein, IT IS ORDERED that Defendant Basim Omar Sabri's Motion to Dismiss the Indictment Because 18 U.S.C. §666 is Unconstitutional (Doc. No. 43) is GRANTED. The Indictment (Doc. No. 1) is hereby DISMISSED.

January 2002
s/RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	INDICTMENT
Plaintiff,	)	18 U.S.C. §666(a)(2)
v.	)	
BASIM OMAR SABRI,	)	
Defendant.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:
1. At all times material to this Indictment:

a. The City of Minneapolis is a local government within the State and District of Minnesota. The City of Minneapolis received, and the City Council administered, federal assistance in excess of $10,000 (approximately $28.8 million) during the one year period beginning January 1, 2001. The budgetary, business, regulatory and governmental affairs of the City of Minneapolis are governed by a Mayor and 13 member City Council.

b. The Minneapolis Community Development Agency (MCDA) is an entity created by the Minneapolis City Council to fund housing and economic redevelopment within the City of Minneapolis. The MCDA and its programs are financed in part by federal assistance in the form of Community Development Block Grants and other federal programs in excess of $10,000 (approximately $23 million) in the one year period starting January 1, 2001. The MCDA has an Executive Director appointed by the Mayor and the MCDA is governed by a Board of Commissioners which is composed of the thirteen elected members of the Minneapolis City Council.

c. The Minneapolis Neighborhood Revitalization Program (NRP) is an entity formed by the City of Minneapolis and other local governmental entities to provide

funding for the economic revitalization of Minneapolis neighborhoods through neighborhood steering committees. The Minneapolis NRP is wholly funded by the MCDA and its affairs are managed by the NRP Policy Board which includes the Mayor and members of the Minneapolis City Council.

d. Defendant BASIM OMAR SABRI is a businessman doing business within the City of Minneapolis as a property developer and landlord. Sabri Properties, Inc. is a business owned or controlled by the defendant and doing business within the City of Minneapolis. From before May 2001 through at least July 17, 2001, defendant SABRI was pursuing a proposed real estate development project located at 2nd Avenue and Lake Street within the Eighth Ward of the City of Minneapolis. The proposed project involved both a hotel and commercial retail concerns and the proposal contemplated zoning, eminent domain/condemnation, licensing and funding actions by the City of Minneapolis, the MCDA and the NRP.

e . From 1993 through July 17 , 2001, BRIAN CURTIS HERRON was a member of the Minneapolis City Council representing the Eighth Ward. HERRON's council committee assignments included the Ways and Means/Budget, Public Safety and Regulatory Services and Health and Human Services committees. As a member of the Minneapolis City Council, HERRON also was appointed to serve as a member of the Board of Commissioners overseeing the actions and budget of the MCDA. As a member of the Minneapolis City Council and the MCDA, HERRON was an agent of the City of Minneapolis and the MCDA.

COUNT 1

(Corruptly Offering/Giving Something of Value to an Agent of Local Government)

2 . The grand jury realleges paragraph 1 as though reasserted in full.

3. From on or about July 2, 2001 through July 17, 2001, in the State and District of Minnesota, the defendant,

BASIM OMAR SABRI,

did corruptly give, offer and agree to give a thing of value, namely $5,000, to BRIAN CURTIS HERRON with the intent to influence and reward HERRON, who was an agent of the City of Minneapolis and the MCDA, for HERRON's assistance in obtaining regulatory approvals from the City of Minneapolis that were necessary for a commercial real estate development project then being pursued by defendant SABRI, such business, transactions, or series of transactions involving something of value of over $5,000; all in violation of Title 18, United States Code, Section 666(a)(2) .

COUNT 2

(Corruptly Offering/Promising Something of Value to an Agent of Local Government)

4. The grand Jury realleges paragraph 1 as though reasserted in full.

5. From on or about July 2, 2001 through July 17, 2001, in the State and District of Minnesota, the defendant,

BASIM OMAR SABRI,

did corruptly offer and agree to give a thing of value, namely, $10,000, to BRIAN CURTIS HERRON with the intent to influence and reward HERRON, who was an agent of the City of Minneapolis and the MCDA, in return for HERRON's attendance at a meeting with private business owners HERRON's threat to use eminent domain to take their

property if they did not sell to SABRI which property was necessary for defendant SABRI's commercial development project and such business, transactions, or series of transactions involving something of value of over $5,000; all in violation of Title 18, United States Code, Section 666(a)(2).

COUNT 3

(Corruptly Offering/Promising Something of Value to an Agent of Local Government)

6. The grand jury realleges paragraph 1 as though reasserted in full.

7. From on or about July 7, 2001 through July 17, 2001, in the State and District of Minnesota, the defendant,

BASIM OMAR SABRI,

did corruptly offer and agree to give a thing of value, namely, $80,000, to BRIAN CURTIS HERRON with the intent to influence and reward HERRON, who was an agent of the City of Minneapolis and the MCDA, as a 10% commission and in return for HERRON's obtaining $800,000 in community economic development grants from the City of Minneapolis, MCDA and other entities for defendant SABRI's commercial real estate development project, such business, transactions or series of transactions involving something of value of over $5,000; all in violation of Title 18, United States Code, Section 666(a)(2).

A TRUE BILL
s/UNITED STATES ATTORNEY
s/FOREPERSON

Supreme Court, U.S.
FILED
SEP 5 2003
OFFICE OF THE CLERK

No. 03-44

In the Supreme Court of the United States

BASIM OMAR SABRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to dismissal of the indictment charging him with three counts of bribery, in violation of 18 U.S.C. 666(a)(2), on the ground that the statute is facially unconstitutional.

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BASIM OMAR SABRI, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 326 F.3d 937. The decision of the district court (Pet. App. A37-A62) is reported at 183 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2003. The petition for a writ of certiorari was filed on July 2, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted on three counts of bribery, in violation of 18 U.S.C. 666(a)(2). Before trial, the United States District Court for the District of Minnesota

dismissed the indictment on the ground that Section 666(a)(2) is unconstitutional on its face. Pet. App. A37-A62. The court of appeals reversed. Pet. App. A1-A29.

1. Petitioner, a Minneapolis, Minnesota, real estate developer and landlord, was charged with three counts of bribery, in violation of 18 U.S.C. 666(a)(2). In relevant part, Section 666 provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> * * * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. 666(a)(2) and (b).

The charges against petitioner arose out of bribes and bribe offers petitioner allegedly made to Brian Herron, who served on the Minneapolis City Council

representing the Eighth Ward from 1993 through July 2001. Pet. App. A64. According to the indictment, during the calendar year beginning January 1, 2001, the City of Minneapolis (the City) received approximately $28.8 million in federal funds. The Minneapolis Community Development Agency (MCDA) is a City agency created to fund housing and economic development programs within the City. In the calendar year beginning January 1, 2001, MCDA received approximately $23 million in federal funds. As a member of the City Council, Herron was a member of the Board of Commissioners overseeing the actions and budget of the MCDA. The Minneapolis Neighborhood Revitalization Program (MNRP) is an agency created by the City and other local government entities which provides funding for the economic revitalization of City neighborhoods. MCDA wholly funds MNRP. *Id.* at A63-A64.

Petitioner sought to develop a commercial real estate project within the Eighth Ward, the ward represented by Herron. Pet. App. A64-A66. The proposal "contemplated zoning, eminent domain/condemnation, licensing and funding actions by the City of Minneapolis, the MCDA, and the MNRP." *Id.* at A64. The indictment alleged that petitioner gave Herron $5000 in an attempt to obtain Herron's assistance in securing regulatory approval from the City to commence the real estate project (Count 1); that petitioner offered Herron $10,000 to threaten the current property owners that the City would use its power of eminent domain to take their property if they did not sell to petitioner (Count 2); and that petitioner offered to give Herron $80,000 as a 10% kickback in return for his assistance in obtaining $800,000 in community economic development grants from the City, MCDA, and other entities, for the real estate project (Count 3). *Id.* at A64-A66.

Before trial, petitioner moved to dismiss the indictment on the ground that Section 666 is unconstitutional on its face. Pet. App. A37. Granting the motion, the district court ruled that Section 666(a)(2) "does not require the government to prove a connection between the offense conduct and the expenditure of federal funds," Pet. App. A53, and that Section 666(a)(2) therefore exceeds Congress's powers under the Spending Clause of the Constitution, Art. I, § 8, Cl. 1.[1] Pet. App. A53-A61. The district court found that the government's assertion that it would establish a connection between the bribes allegedly offered and paid by petitioner and the expenditure of federal funds was irrelevant to the motion to dismiss. *Id.* at A53 n.9.

2. The court of appeals reversed and remanded. The court of appeals agreed with the district court that Section 666 contains no requirement that the government prove a connection between the offense conduct and federal funds (other than the express requirement that the relevant organization, government, or agency have received benefits under a federal program in excess of $10,000 during the one-year period). Pet. App. A4; see *id.* at A4-A14. The court of appeals also stated that, because Section 666 is a general criminal statute that directly regulates the conduct of persons who are not parties to any contract with the federal government, the statute was not within the congressional power to condition funding under the Spending Clause. *Id.* at A14-A19.

---

[1] That provision declares that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the * * * general Welfare of the United States." See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 9 n.5 (1981).

The court of appeals, however, upheld the facial constitutionality of the statute based on Congress's authority to enact "necessary and proper" legislation, see U.S. Const. Art. I, § 8, Cl. 18 (Necessary and Proper Clause), to implement the Spending Clause. "[W]e conclude that §666 is a law necessary and proper to the execution of Congress's spending power." Pet. App. A21. The court explained that Congress has a right to disburse federal funds to "subnational agencies," and to protect those disbursements, once made, from misappropriation. *Ibid.* In that regard, Congress had made a determination that "the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds." *Id.* at A25. "The maladministration of funds in one part of an agency can affect the allocation of funds, whether federal or local in origin, throughout an entire agency," the court continued. *Ibid.* Because "money is fungible" and "federal funds are often commingled with funds from other sources," the court also rejected the suggestion that corruption involving a discrete agency department or section that does not itself receive federal funds or administer a federal program can have no effect on the integrity or efficacy of a federal program. *Ibid.*

The court of appeals also noted that, in *Salinas* v. *United States*, 522 U.S. 52, 60 (1997), and *Fischer* v. *United States*, 529 U.S. 667 (2000), this Court had rejected as-applied challenges to Section 666. Pet. App. A19. In view of those decisions, the court of appeals explained that it would be "ill-advised to now declare that §666 is void ab initio as being outside of Congress's legislative domain." *Ibid.*

Judge Bye dissented. Pet. App. A29-A36. In Judge Bye's view, Section 666 could not be upheld under the Necessary and Proper Clause because the statute

"usurp[ed] the traditional domain of state authority" and therefore was not a "proper" law. *Id.* at A33. "The lack of any connection" between federal benefits and the bribe, he stated, "makes all too real the risk that federal anticorruption efforts will swamp state and local efforts to combat bribery." *Id.* at A33-A34.

ARGUMENT

Petitioner urges this Court to grant the petition for a writ of certiorari to resolve whether Section 666 should be construed to require the government to prove some connection between the offense conduct and federal funds other than the express statutory requirement that the relevant organization, government, or agency have received benefits under a federal program in excess of $10,000 in any one-year period. The court of appeals correctly held that Section 666 does not require a specific nexus (beyond the statutory requirement that the covered entity have received more than $10,000 in federal benefits in a single year) between federal funds and the charged criminal conduct and that, so construed, the statute is facially constitutional. While there is some disagreement among the courts of appeals on the federal nexus necessary to permit conviction under Section 666, this case is not an appropriate vehicle for addressing that issue. The issue's resolution would not alter the judgment in this case, which rejects petitioner's facial challenge to the statute. The case lacks the sort of factual development that would permit the Court to address the issue in a sufficiently concrete manner. And the case's interlocutory posture also makes review inappropriate at this time.

1. This case involves a facial challenge to Section 666's constitutionality. See Pet. App. A37 (motion to dismiss indictment "on the grounds that 18 U.S.C. §666

is unconstitutional on its face"); *id.* at A29 (reversing "that part of the district court's judgment finding §666 [ ] facially unconstitutional"). "A facial challenge to a legislative Act is * * * the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). "The fact that the * * * Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Ibid.*

Whether or not Section 666 is interpreted to require proof of an additional nexus between a bribe and the expenditure of federal funds, petitioner cannot make the required showing that Section 666 is incapable of constitutional application. In *Salinas* v. *United States*, 522 U.S. 52 (1997), this Court upheld a conviction under Section 666(a)(1)(B), a parallel provision to the subsection at issue here, when the defendant was a county sheriff's deputy who received a bribe from a federal prisoner who was housed in the county jail pursuant to a federally funded program. The Court determined that, because the bribe at issue there posed "a threat to the integrity and proper operation of the federal program," *id.* at 61, the nexus between the defendant's conduct and the expenditure of federal funds was "close enough to satisfy whatever connection the statute might require," *id.* at 59. The Court specifically rejected the argument that Section 666 exceeds Congress's legislative powers. The Court stated that "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case," *id.* at 60, and held that "the application of § 666(a)(1)(B) to

Salinas did not extend federal power beyond its proper bounds," *id.* at 61.

The claim that Section 666 is unconstitutional on its face cannot be reconciled with *Salinas*. Because *Salinas* found a set of circumstances under which Section 666 would be valid, *i.e.*, the circumstances of *Salinas* itself, it forecloses the claim that "no set of circumstances exists under which the Act would be valid," *Salerno*, 481 U.S. at 745. As the court of appeals recognized, it would be "ill-advised"—indeed, incongruous—for a court of appeals "to now declare" Section 666 incapable of constitutional application and thus unconstitutional on its face "after [this] Court has * * * indicated that the statute can be constitutional as applied." Pet. App. A19.

Consistent with the decision in this case, every court of appeals to have addressed Section 666's facial constitutionality has upheld the statute. For example, in *United States* v. *Edgar*, 304 F.3d 1320, cert. denied, 537 U.S. 1078 (2002), the Eleventh Circuit reasoned:

> [A] basis for the enactment of § 666 may be found in Congress's authority, under the Necessary and Proper Clause, to protect its capacity to fruitfully exercise the spending power. As a means of ensuring the efficacy of federal appropriations to comprehensive federal assistance programs, the anti-corruption enforcement mechanism strikes us as bearing a sufficient relationship to Congress's spending power to dispel any doubt as to its constitutionality.

Id. at 1325; accord *United States* v. *Bynum*, 327 F.3d 986, 991 (9th Cir. 2003) ("We agree with the Eighth and Eleventh Circuits that § 666 is facially constitutional.").

2. Respondent does not directly contest the court of appeals' rejection of his facial challenge. Instead, respondent focuses primarily on the court of appeals' conclusion that Section 666 does not require a nexus between the bribe and federal funds (other than the express requirement that the organization, government, or agency the defendant sought to influence have received benefits in excess of $10,000 under a federal program during the relevant one-year period).

In *Salinas*, this Court held, as a matter of statutory construction, that the government did not have to show that the bribe had "any particular influence on federal funds." *Salinas*, 522 U.S. at 61. But the Court left open "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." *Id.* at 59. Following *Salinas*, there has been some divergence in the courts of appeals on whether and to what degree Section 666 requires the government to prove such a further connection between the defendant's criminal acts and a federal programmatic interest (including, but not necessarily limited to, the integrity of federal funds).[2]

---

[2] Since *Salinas*, the Sixth and Seventh Circuits, and the Eighth Circuit in this case, have all held that Section 666 contains no requirement that the government prove any connection between the offense conduct and federal funds beyond the express statutory requirement. Pet. App. A14-A19; *United States* v. *Suarez*, 263 F.3d 468, 489-491 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Dakota*, 197 F.3d 821, 826 (6th Cir. 1999); *United States* v. *Grossi*, 143 F.3d 348 (7th Cir.), cert. denied, 525 U.S. 879 (1998). The Second Circuit, in contrast, has reaffirmed, in dicta, its pre-*Salinas* position that Section 666 requires the government to show some connection between the prohibited act and a federally funded program. *United States* v. *Santopietro*, 166 F.3d 88, 92-94 (2d Cir. 1999). The Third Circuit has similarly held that Section 666 "requires that the government prove a federal interest is

This case, however, does not squarely require resolution of that issue, because the judgment rejecting petitioner's facial challenge is correct without regard to whether Section 666 imposes a further nexus requirement. As noted above, the facial challenge petitioner brought could succeed only if Section 666 were incapable of constitutional application. Pp. 6-8, *supra*. Because Section 666 is capable of constitutional application —and no court of appeals has held otherwise—the court of appeals correctly rejected petitioner's facial challenge and reversed the district court's contrary decision.

This case, moreover, lacks concrete development of facts that bear on the ultimate legal issues the petition seeks to raise. In both district court and the court of appeals, the government explained that it could establish a connection between the bribes allegedly offered by petitioner and the expenditure of federal funds. See Pet. App. A53 n.9; Gov't C.A. Br. 24-25. The evidence at trial, the government explained, would show that Councilperson Herron had direct control and influence over the federal funds received by the City of Minneapolis and the MCDA; that those same federal funds were directly related to economic development programs operated by the City and MCDA; that the economic and development programs operated by the City and the MCDA were directly involved in the real estate development that petitioner proposed; that petitioner's bribes and bribe offers sought to corrupt the operation of the city's economic redevelopment

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implicated by the defendant's offense conduct," although it minimized that requirement by indicating that a "highly attenuated" federal interest would suffice. *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999).

process; and that petitioner offered a direct kickback of the federal economic development funds obtained. See Gov't Br. 24-25. As it did in *Salinas*, the government thus was prepared to present evidence sufficient to show that the nexus between the defendant's conduct and the expenditure of federal funds was "close enough to satisfy whatever connection the statute might require." 522 U.S. at 59. Because the challenge was facial, however, the district court deemed the government's proffer irrelevant; and the court of appeals did not mention it. Pet. App. A53 n.9.

Review in this posture would be particularly awkward given that petitioner, in the district court and court of appeals, argued against the further nexus requirement. In the lower courts, petitioner did not contend that the government failed to provide sufficient proof of a statutorily required nexus; he argued that the statute was unconstitutional on its face because it does not require proof of a nexus. Petitioner thus asks this Court to review the statutory question of whether a further nexus is required even though the court of appeals agreed with petitioner's position. He now contends (Pet. 12) that, if Section 666 is construed to require a nexus between the illegal conduct and federal funds beyond the literal requirements of the statutory language, the first two counts of the indictment should be dismissed because such a nexus is not sufficiently alleged. Petitioner does not make that claim with respect to Count 3, which specifically alleges that the bribe was to constitute a percentage of the funds petitioner obtained in community economic development grants. See Pet. App. A66. Because petitioner's present argument on the nexus issue, even with respect to the first two counts, was not raised or addressed either in the district court or the court of appeals, it is not the

sort of claim this Court will ordinarily review. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (Court ordinarily will not consider issues not pressed or passed upon below); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977) (same); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (same).

Finally, this case is at an interlocutory stage and does not warrant review at this time. The court of appeals reversed the dismissal of the indictment and remanded for further proceedings. Only in "extraordinary cases" will this Court grant a petition for a writ of certiorari before "final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). If petitioner is acquitted at trial, or if any conviction is reversed on independent grounds, his constitutional challenge to Section 666(a)(2) will become moot. If petitioner is found guilty and his conviction is affirmed on appeal, he will be able to raise the instant claims—along with any other challenges petitioner might have to the judgment of conviction—at the conclusion of proceedings in the trial court and the court of appeals with the benefit of a full record. Review by this Court is therefore unwarranted at the current time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2003

Supreme Court, U.S.
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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Respondent's opposition to certiorari does not address the critical reasons why this Court should grant the petition: the courts of appeal are divided on what source of constitutional authority congress had to enact 18 U.S.C. §666 and whether an element requiring a nexus between the alleged bribe and federal funds must be read into 18 U.S.C. §666 to save it from constitutional infirmity. As the petition explains (Pet. at 9) the Court of Appeal's holding here-- that congress lacked the authority under the spending clause (but had it under the necessary and proper clause) to enact section 666 – conflicts with decisions of the Second and Third Circuits. As the petition also explains (Pet. at 9-11) the court of appeals' holding here – that no nexus element is required to save 18 U.S.C. 666 from constitutional infirmity – conflicts with decisions of the Second, Third, and Eleventh Circuits.

Despite Respondent's assertion to the contrary, this case provides the perfect vehicle for this Court to resolve what the petition describes, and the Respondent does not dispute, is a recurring question of fundamental importance to the states and federal government. Despite Respondent's claim this case "lacks the sort of factual development that would permit the Court to address the issue in a sufficiently concrete manner," the issue presented is a legal question and further factual development will not assist the Court in resolving it. The issue has been "developed" because it has been considered and decided by the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuit Courts of Appeal.

Respondent attempts to mislead this Court into denying certiorari by contending that "Respondent (sic) does not directly contest the Court of Appeals' rejection of his facial challenge." (Res. at 9). Respondent's argument misstates the record. The Petition is clear that the issue

presented is a facial challenge to the constitutionality of 18 U.S.C. § 666. (Pet. at 11).

The point of the Petition's reference to the Court of Appeals' split over whether to impose a nexus requirement is that lower courts have been so confused about the constitutionality of 18 U.S.C. § 666, and are so desperately in need of guidance from this Court, that they have been unable to fashion a consistent rationale or result when addressing the issue presented by the Petition. The District Court in this case, and Judge Bye's dissent in the Eighth Circuit Court of Appeals' decision, articulated what Petitioner believes is the correct result -- finding 18 U.S.C. § 666 unconstitutional on its face. Beyond that, it is germane to this Court's certiorari analysis that the Courts of Appeal are deeply divided as to the constitutional rationale for their decisions on the issue presented by the Petition. Worse, the Courts of Appeal are also divided about whether constitutional infirmities in 18 U.S.C. § 666 compel them to read a "nexus" element into the statute in order to save it from constitutional challenge. The radical and multi-pronged divergence of opinion among lower court judges in addressing the issue presented by the Petition leaps out as a justification for this Court to accept certiorari.

2. Respondent devotes a substantial portion of its brief to making the untenable argument that this Court's decisions in United States v. Salerno, 481 U.S. 739 (1987), and Salinas v. United States, 522 U.S. 52 (1997), read together, foreclose a facial constitutional challenge to 18 U.S.C. §666.

Respondent claims Salerno says a statute can only be declared unconstitutional "on its face" where it is established that no set of circumstances can exist under which the act is valid is wrong. (Res. at 7). Salerno did say that, but this Court has all but abrogated the Salerno dicta upon which the Respondent bases its argument. Justice Stevens described the current status of the Salerno dicta, concurring in the denial of certiorari in Janklow v. Planned Parenthood, 517 U.S. 1174 (1996):

> Part II of the [Salerno] opinion [opens] with a rhetorical flourish, stating that a facial challenge must fail unless there is "no set of circumstances" in which the statute could be validly applied. That statement was unsupported by citation or precedent. It was also unnecessary to the holding in the case, for the Court effectively held that the statute at issue would be constitutional as applied in a large fraction of cases.
>
> While a facial challenge may be more difficult to mount than an as applied challenged, the dicta in Salerno "does not accurately characterize the standard for deciding facial challenges," and "neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles." For these reasons, Salerno's rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context.

Janklow, 517 U.S. at 1175 (Stevens, J., concurring) (quoting Dorf, *Official Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 236, 238 (1994); other citations omitted.)

The majority opinion in City of Chicago v. Morales, 527 U.S. 41 (1999), echoed Justice Stevens' disdain for Salerno.

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in

> any decision of this Court, including Salerno itself...

Morales, 527 U.S. at 55 n. 22. In fact, the only reason this Court has not explicitly overruled Salerno is that "[no] federal court has ignored the appropriate principle and applied the draconian 'no circumstance' dictum..." Janklow, 517 U.S. at 1175 (Stevens, J., concurring).

The Respondent's stubborn reliance on the oft-repudiated Salarno dicta is, if anything, another compelling reason to grant certiorari in this case. As the above-cited cases reflect, the Salarno dicta has prompted unwanted confusion among the lower courts. As long as it is permitted to stand without express repudiation, the Salerno dicta poses the risk that lower courts will lapse into error by relying upon it. This case presents an opportunity for the Supreme Court to squarely overrule the troublesome and overreaching dicta of Salerno. That opportunity is another reason for the Court to grant certiorari.

3. Respondent's claim that this Court rejected a constitutional challenge to Section 666 in Salinas is based on dicta in this Court's opinion and not on this Court's actual holding. The language pointed to in Respondent's Brief at page 7 to support this contention is dicta for five reasons:

First, this Court's Order granting Certiorari in Salinas was limited to two issues: whether Section 666 is limited to cases in which the bribe has a demonstrated effect upon federal funds, and an unrelated RICO issue. Salinas v. United States, 519 U.S. 1148 (1997). The Court did not grant certiorari on the question whether 18 USC §666 was a constitutional exercise of the Congress's spending power, and, importantly, the constitutionality of the statute had not been addressed by the lower courts. Id.; United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996).

Second, the issue had not been fully briefed by the petitioner. The spending clause was mentioned only

tangentially in a footnote in the petitioner's brief. This Court had not granted certiorari on this issue. Issues omitted from the grant of certiorari are not considered by the Supreme Court. Sup. Ct. R. 14(1)(a) ("Only the issues set out in the petition, or fairly included therein, will be considered by the Court).

Third, the transcript of the oral argument before this Court in Salinas exposes the flaw in the Respondent's claim. Statements made during oral argument support the conclusion that the constitutionality of Section 666 was not before this Court. The argument shows this Court's unwillingness even to consider the issue. Specifically, the following rebuff of the petitioner's counsel by this Court shows the issue concerning whether Section 666 exceeds congressional authority under the spending clause and the Tenth Amendment was not properly before this Court and was not going to be considered.

> MR. ENRIQUEZ [Counsel for Petitioner]:
> And I understand that--that the government's position on this is that it's under the spending clause and that by virtue of spending, they can go ahead and regulate. But I--I think this goes beyond that cases that they've cited. None of the cases that they have cited on this regulation issue are criminal law cases. All of the cases that they have cited speak in terms of--of conditions or--r incentives to the States. None of them speak in terms of--of something as coercive as, we're going to put your--your officials in jail.
>
> So I--I think, when you get to that point, then we run into a spending clause problem. It doesn't seek to justify itself under the terms of--of the Commerce Clause, and so I think

it does exceed the scope of the Constitution, as applied in this case.

QUESTION: Did you make the argument somewhere else along the line, or did you just today?
MR. ENRIQUEZ: I--I don't know that we argued it terms of Commerce Clause, but we argued in terms of property of the government; that this was protection of property statute, and--and that is could be just--it could be justified only on the basis.

QUESTION: But the Tenth Amendment argument that you're presenting to us now –
MR. ENRIQUEZ: Yes, ma'am.

QUESTION: --did you make that in the lower courts?
MR. ENRIQUEZ: We didn't specifically come out and say Tenth Amendment, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Enriquez. This case is submitted.

Salinas v. United States, No. 96-738, 1997 WL 631057, at 53-55 (United State Supreme Court Official Transcript, Oct. 8, 1997) (emphasis added). This exchange clearly demonstrates that the issue concerning the constitutionality of Section 666 was not before this Court and that this Court did not intend to consider it sua sponte.

Fourth, the analysis in the Salinas opinion makes it clear that Salinas is a statutory construction case. The opinion focuses upon whether the statutory language is ambiguous and whether the language requires a direct connection between federal funds and the bribe. This Court

concluded that the unambiguous statutory language doen not require a direct connection between the federal funds and the bribe. Salinas, 522 U.S. at 61.

Salinas does not even mention congressional authority under the spending clause or constitutional limits under the Tenth Amendment. One would have expected that this Court would have at least acknowledged such concepts before passing on the constitutional questions if that was the Court's purpose. This Court undertook nothing like the constitutional analysis that one would expect if this Court was addressing a constitutional issue. Compare United States v. Lopez, 514 U.S. 549 (1995) (analyzing congressional authority and concluding that the Gun-Free School Zones Act was an unconstitutional exercise of federal power).

Fifth, in the instant case, Mr. Sabri was charged under Section 666 (a)(2). This Court has not specifically addressed this section. This section allows a person to be charged with a federal crime if they attempt to bribe an agent of an organization receiving federal funds, even if they have no other connection to the organization receiving federal funds. By contrast, Salinas addressed Section 666 (a)(1)(B), which involves charges against the agent of the organization receiving federal funds. Thus, the subsection at issue in the instant case pulls in people who are a step further removed from the federal funds. This critical difference has not been addressed by this Court, and provides an additional basis for rejecting the Respondent's argument that the constitutionality of Section 666 was resolved by Salinas.

4. Respondent's attempt to cast Petitioner's argument as one presenting a new issue not raised and decided below is not correct. Petitioner has always maintained Section 666 is unconstitutional on its face because Congress lacked the constitutional authority to enact it. In addition, Petitioner has always maintained the federal courts cannot "save" Section 666 from constitutional infirmity by adding an element Congress did not include. The circuits are split on the issue

of whether a nexus element need be added and clearly require guidance from this Court, but the Petitioner's assertion on these issues has never altered. The Respondent specifically recognizes a "divergence" on this issue. (Res. at 9).

5. The interlocutory nature of this case does not prevent this Court from granting certiorari in this case. Respondent argues that the Court would be in a better position to address this appeal when and if there is a trial, conviction and appeal in the courts below. This argument ignores the fact that the question for this Court is purely legal, is a recurring question of fundamental importance and would not benefit from a more complete factual record. A trial in this case would also be tainted by the error in the Court of Appeals. If a trial is held in this case without Supreme Court review, the district court will not have guidance regarding the unanswered circuit split in this case regarding the elements of the statute.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

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No. 03-44

In The Supreme Court of the United States

BASIM OMAR SABRI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") submits this *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed in this case by Basim Omar Sabri.[1] The NACDL is a nonprofit corporation with more than 10,000 lawyer-members and 28,000 affiliate-members in all 50 States. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice and to ensuring that criminal statutes are applied in accord with the United States Constitution. In furtherance of this and its other objectives,[2] the NACDL files approximately 35 *amicus*

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[1] The parties have consented to the submission of this *amicus curiae* brief, and their letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus curiae*, its members, or its counsel contributed money or services to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

[2] More information about the NACDL, its work, and its mission is available at http://www.nacdl.org.

curiae briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

This case involves the interpretation, and the constitutional validity, of a relatively novel but increasingly employed federal criminal statute, 18 U.S.C. § 666,[3] that has engendered fierce debate about some of the "oldest questions" of constitutional law. *See* New York v. United States, 505 U.S. 144, 149 (1992) ("The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States.").

STATEMENT OF THE CASE

The relevant facts of this case, as well as its procedural history, are set out clearly and completely in Mr. Sabri's Petition, in the Appendix to that Petition, and in the opinions of the courts below. *See United States v. Sabri,* 183 F. Supp. 2d 1145 (D. Minn. 2002), *rev'd,* 326 F.3d 937 (8th Cir. 2003). For purposes of this *amicus curiae* brief, it is sufficient to emphasize at the outset that both the District Court and the Court of Appeals below concluded explicitly that Section 666 cannot be justified constitutionally as a spending condition within the meaning of *South Dakota v. Dole,* 483 U.S. 203 (1987). *See Sabri,* 183 F. Supp. 2d at 1156 ("Section 666 plainly is not a 'condition' statute within the reasoning of *Dole* and cannot be justified under that decision as a valid exercise of Congress's power under the Spending Clause."); *Sabri,* 326 F.3d at 947-48 ("[W]e conclude that [Section] 666 cannot be sustained as a condition attached to the receipt of federal funds because this statute is not a conditions statute at all."). The Court of Appeals concluded, however, that Section 666 is nonetheless "a law necessary and proper to the execution of Congress's Spending Power." *Sabri,* 326 F.3d at 950.

Thus, this case squarely and cleanly presents for this Court's review a question of statutory interpretation that is clear and straightforward but at the same time implicates "first principles" of our constitutional federalism. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

However, the reading of the statute endorsed by the Court of Appeals below is incongruent with Congress's purpose and threatens to disrupt the Constitution's "delicate balance" between state and federal power. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1992). The spending power enjoyed by Congress under Article I does

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[3] Section 666 — sometimes characterized as the "the Beast in the Federal Criminal Arsenal" and "the Stealth Statute" — makes run-of-the-mill bribery a federal crime if the bribe relates to a transaction worth more than $5,000 and involves the agent of any organization or government that receives "in any one year period[] benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b). *See generally* Fischer v. United States, 529 U.S. 667 (2000); Salinas v. United States, 522 U.S. 52 (1997); George D. Brown, *Stealth Statute: Corruption, The Spending Power, and the Rise of Section 666*, 73 NOTRE DAME L. REV. 247 (1998); Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990).

not permit the federal government to nationalize all local bribery prosecutions absent *some* connection with the integrity of a federal program. *Cf. Lopez*, 514 U.S. at 563 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."). Section 666 should be read to avoid such a result; otherwise – as we discuss in more detail below – it should be invalidated.[4]

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[4] *Amicus* notes that a petition for a writ of certiorari is also pending in *Krilich v. United States*, 257 F.3d 689 (7th Cir. 2001), *cert. pending* __ U.S.L.W. ____ (U.S. June 26, 2003) (No. 02-1445). *Krilich* presents the question of whether the 18 U.S.C. § 1014 criminalizes the making of false statements to federally insured institutions, even when those statements are unrelated to any particular lending transactions. Section 1014, dealing with "loan and credit applications," makes it a crime to "knowingly make[] any false statement * * * for the purpose of influencing in any way * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation." The Seventh Circuit held that Section 1014 applies to "transactions other than loans" or other extensions of credit. In effect, this holding extends Section 1014 to cover *any* false statement, regardless of context or subject, to a banking institution. In other words – and like the interpretation of Section 666 embraced by the court below in this case – the Seventh Circuit's broad interpretation of Section 1014 expands the number of transactions covered by the statute far beyond the lending activities that are likely to effect federal funds.

Amicus believes that Mr. Sabri's case and *Krilich* present similar questions of similar constitutional and administrative import. In the interpretation of both statutes, this Court is asked to decide whether or not – in the context of a criminal statute grounded upon Congress's Spending Power – the government must establish a clear nexus between the offense conduct and its effect on federal funds.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION ON WHICH THE COURTS OF APPEALS ARE CLEARLY AND DEEPLY DIVIDED

NACDL fully endorses the Petitioner's observation that "[t]his case presents a recurring question of fundamental importance to the relationship between the states and the federal government which this Court previously left open and which has intractably divided the courts of appeals," Pet. at 2, and also the claim that "[t]his case presents an ideal vehicle to resolve [this] conflict," *id.* at 11.

Section 666 is an important and increasingly deployed weapon in federal prosecutors' anti-corruption arsenal. As Professor Brown reports, in a just-published study:

> [p]rosecuting state and local corruption is an important activity of the Department of Justice. Between 1981 and 2000, 1,704 state officials were indicted on corruption offenses, 1,462 were convicted, and 554 were awaiting trial at the end of 2000. The twenty-year totals for local officials were as

follows: 4,968 were indicted, 4,233 were convicted, and 1,735 were awaiting trial as of the end of the year.[5]

Commenting particularly on Section 666, Professor Brown notes that "[t]his surprisingly little-known statute is on the way to becoming a favorite tool of federal prosecutors dealing with state and local corruption."[6] The increasingly important role played by this statute makes it all the more important that this Court provide prosecutors, defense counsel, and courts alike with a definitive interpretation of its elements and identification of its requirements.[7]

The Question Presented here is all the more significant in light of its implications for the ongoing debate concerning the dangers the federalization of crime poses to the administration of federal criminal justice and "first principles" of constitutional federalism.[8] In the words of one District Court, this case, and the Question Presented, "raise[] the question of how far Congress has

[5] George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 421 (2003).

[6] *Id.* at 504.

[7] By 1990, there were only nine published opinions discussing the provision. Since then, use of the statute has increased dramatically. *See* Rosenstein, *The Beast in the Federal Arsenal, supra,* at 690 & n. 152.

[8] *See generally* Chief Justice William H. Rehnquist, *Report to Congress* (Jan. 1, 1999) (noting that the over-federalization of crime "threatens to change entirely the nature of our federal system[.]"),

gone, and, under the Constitution, may go, to federalize crime."[9] In a similar vein, the American Bar Association has called for a "principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization."[10]

[9] *United States v. McCormack*, 31 F. Supp. 2d 176, 177 (D. Mass. 1998). Even a brief survey of the reported cases involving Section 666 prosecutions reveals shows that the statute's use threatens the federal-state balance that is particularly important in the criminal-law context, and has often reached garden-variety local corruption where there is no meaningful connection to a federal interest. *See, e.g., United States v. Grossi*, 143 F.3d 348 (7th Cir. 1998) (town supervisor demanded and received bribes for, *e.g.*, administering local general-assistance program funds to compensate doctors for unpaid bills); *United States v. DeLaurentis*, 230 F.3d 659 (3rd Cir. 2000) (supervisor of police detectives, in return for bribes, interceded with town council to keep a bar open, thereby necessitating disproportionate allocation of police manpower to the detriment of street patrols elsewhere); *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989) (contractor sold pipe to counties and gave kickbacks to county officials who granted contracts); *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993) (county executive received bribes in connection with civic-center project and automobile purchases); *United States v. Lipscomb*, 299 F.3d 303 (5th Cir. 2002) (city council member accepted bribes from taxicab company owner); *United States v. Ferrara* 990 F.Supp. 146 (E.D.N.Y. 1998) (defendant charged with bribing town board in exchange for change in zoning to allow construction of radio tower); *United States v. Smith*, 659 F.Supp. 833 (S.D.Miss. 1987) (county supervisor charged with accepting bribes in connection with purchase of culverts and grader blades).

[10] ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 56 (1998).

In that context, the Court of Appeals' broad reading of Section 666 is untethered to a federal interest in particular federal projects or programs, and should therefore trigger the established canon of construction that statutes be read so as to eliminate constitutional doubts.[11] Indeed, as Professor Brown has observed, the relevant legislative history "support[s] the interpretation that Congress intended to deal with a relatively narrow problem, [namely,] specified forms of malfeasance in connection with the administration of federal assistance."[12]

II.

COURTS AND COMMENTATORS ARE DIVIDED ON THE QUESTION WHETHER AND HOW CONGRESS'S SPENDING POWER AUTHORIZES SECTION 666 AND ITS APPLICATIONS

The Question Presented in this case involves more than a technical disagreement among courts about the correct reading of statutory text; it concerns also a fundamental and pressing matter of constitutional law.

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[11] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

[12] Brown, *Stealth Statute, supra,* at 280 (1998). Congress's purpose for enacting Section 666 was "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies[.]" S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

As the court below observed, "it is axiomatic that '[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.' *United States v. Morrison,* 529 U.S. 598, 607 (2000)." *Sabri,* 326 F.3d at 945. Accordingly, courts and commentators have frequently observed that the constitutional authorization for Section 666 is Congress's "Spending Power" – *i.e.,* its power to "provide for the . . . general Welfare of the United States."[13] It is not at all clear, however, how, whether, and to what extent the Spending Power authorizes the creation, prosecution, and punishment of federal crimes. As Professor Engdahl has (colorfully) put it:

> [f]unds recipients are not protectorates of the federal government[.] . . . The

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[13] U.S. CONST. art. I, § 8, cl. 1. *See, e.g., Fischer,* 529 U.S. at 689 n.3 ("Section 666 was adopted pursuant to Congress' Spending Power, Art. I, § 8, cl. 1.") (Thomas, J., dissenting); *United States v. Phillips*, 219 F.3d 404, 414 (5th Cir. 2000) ("Congress' authority to enact Section 666 rests on the Spending Clause of the Constitution."); *United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring) ("Every court that has addressed the issue has concluded that Congress adopted Section 666 pursuant to its Spending Clause power."); *United States v. McCormack*, 31 F. Supp. 2d 176, 186 n.18 (D. Mass. 1998) ("Courts have held that section 666 was passed pursuant to Congress' tax and spending power as set forth in Article I, Section 8."); Brown, *Stealth Statute, supra*, at 262; David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 92 (1994) (asserting that Section 666 and similar provisions "lack any basis in the Constitution" and that "Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else").

> Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog. Money cannot infect the recipient with the germ of generalized federal governing control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property.[14]

The courts clearly and sharply disagree whether Section 666 should be evaluated, and can be justified, using this Court's conditional-spending precedents. It is, of course, settled law that Congress may spend money on projects and in pursuit of ends that are neither mentioned nor authorized explicitly in Article I, and also may enthusiastically promote policy goals that might lie beyond the reach of its enumerated powers merely by attaching conditions to the money it spends.[15] Thus, even as this Court has often in recent years addressed the outer boundaries of federal power, Congress's ability to regulate

[14] Engdahl, *The Spending Power, supra,* at 92.

[15] *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution[,]" and so "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.") (citation and quotation marks omitted).

broadly through conditional spending, *i.e.*, its power to regulate via contract,[16] has not been questioned.[17]

It is far from clear, though, that a federal criminal statute imposing liability on third parties (*i.e.*, on parties other than the federal government's actual "contracting" partners) can helpfully or coherently be considered a regulatory condition within the meaning of this Court's conditional-spending caselaw. Again, as Professor Engdahl has put it, "it cannot be sufficient to give constitutional competence to Congress that the deed sought to be punished is done against one to whom Congress has extended financial aid."[18]

[16] *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

[17] *See Printz v. United States,* 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) ("[The Court's] holding . . . does not spell the end of the objectives of the Brady Act . . . [because] Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs."); *Alden v. Maine*, 527 U.S. 706, 755 (1999) (citing *Dole*, and observing that the Federal Government does not "lack the authority or means to seek the States' voluntary consent to private suits"). *See also* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 116 ("[A]ny time that Congress finds itself limited by . . . delegated regulatory powers, . . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective.").

[18] Engdahl, *The Spending Power, supra,* at 92.

This Court has not yet had occasion to consider the applicability of *South Dakota v. Dole* and its conditional-spending progeny to a challenge to the constitutional validity of a federal criminal statute or its application. It would seem, though – given "first principles" of federalism and the restrictions on conditional spending set out in *Dole*, 483 U.S. at 206-208 – that at least some applications of Section 666 will be difficult to justify under the conditional-spending doctrine.

Otherwise, "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York v. United States*, 505 U.S. 144, 167 (1992). Indeed, this Court's *Salinas* opinion – although it clearly assumed that Section 666 is a constitutionally valid enactment – acknowledged the possibility that the Constitution limits the use of Section 666 in cases not implicating the integrity of federal programs and funds.[19]

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[19] *Salinas*, 522 U.S. at 59 (leaving open the question whether Section 666 requires some "connection between a bribe and the expenditure of federal funds"); *id.* at 61 ("Whatever might be said about [the statute's] application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds."). *See also United States v. Santopietro*, 166 F.3d 88, 93 (1999) ("*Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied."); *United States v. LaHue*, 998 F. Supp. 1182, 1190 (D. Kan. 1998) ("The Supreme Court [in *Salinas*] most certainly was not implying that section 666(b)'s jurisdictional clause should be read any more broadly than its language and purpose

It should be emphasized, though, that while some courts have embraced the view that Section 666 is a conditional-spending measure, to be analyzed and controlled using *Dole*,[20] others have concluded – as the Eighth Circuit concluded in this case – that

> [Section] 666 cannot be sustained as a condition attached to the receipt of federal funds because this statute is not a conditions statute at all. Section 666 is merely a general criminal statute which directly regulates the conduct of persons who are not parties to the funding 'contract.'

Sabri, 326 F.3d at 945-948.[21]

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permit."); *United States v. Roberts*, 28 F. Supp. 2d 741, 745 (E.D.N.Y. 1998) ("*Salinas* . . . did not foreclose the possibility that there is an outer boundary beyond which the relationship between the bribe and the expenditure of federal funds is too remote to support § 666 jurisdiction.").

[20] *McCormack*, 31 F. Supp. 2d at 177; *United States v. Zwick*, 99 F.3d 672, 687 (3d Cir. 1999) (following *McCormack* observing that "[a]pplying § 666 to offense conduct, absent evidence of any federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause"); *Lipscomb*, 299 F.3d at 321 ("although we may debate whether the [§] 666 peg fits the conditional-grant hole, I shall test it under the four prongs of *Dole*.").

[21] *See also, e.g.*, Brown, *Stealth Statute, supra*, at 294–99 (suggesting *Dole* be used in Section 666 cases); *Sabri*, 183 F. Supp. 2d at 1156 ("Section 666 plainly is not a 'condition' statute within the reasoning of *Dole* and cannot be justified under that decision as

The Court below posited that the Spending Power might also justify Section 666 even if Section 666 is not properly regarded as a regulatory condition attached to federal program funds. As Judge Hansen put it below,

> the Spending Power and the Necessary and Proper Clause are contained in section 8 of the first Article, and the Necessary and Proper Clause applies to the spending power, enabling Congress to enact all laws which are convenient to the exercise of disbursing federal funds."

Sabri, 326 F.3d at 947.

In Judge Hansen's view, which is shared by other coourts,[22] "it is an incontestable proposition that the

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a valid exercise of Congress's power under the Spending Clause.").

[22] *See, e.g., United States v. Edgar,* 304 F.3d 1320, 1325 (11th Cir. 2002) ("We are persuaded that a basis for the enactment of [Section] 666 may be found in Congress's authority, under the Necessary and Proper Clause, to protect its capacity to fruitfully exercise the spending power."); *Bynum*, 327 F.3d at 991; *United States v. Bigler,* 907 F. Supp. 401, 402 (S.D. Fla. 1995) ("Article I, § 8 gives Congress the power to 'provide for the ... general Welfare.' "); *Lipscomb,* 299 F.3d at 318 (opinion of Wiener, J.) ("My solo review here will focus on whether § 666 is necessary and proper to the spending power . . . ."). *See also* Brown, *Stealth Statute, supra,* at 266 ("One might assume that the role of the statute is to protect the federal funds that trigger its application. If this were the case, § 666 would simply be a law 'necessary and proper for carrying into [e]xecution' the power to spend the money in the first place, that is,

disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution. We further quickly conclude that Congress also has a legitimate right to protect these disbursements from misappropriation once made." *Ibid.*

However, the contrary view also has vociferous proponents, including judges and commentators. In particular, Judge Smith, of the Fifth Circuit, has observed:

> the government's argument that no connection need be shown between federal funds or programs and the local corruption prosecuted under [Section] 666 confuses a connection to a federal interest in federally-funded programs with the federal government's generalized interest in everything that occurs within its borders. . . . Such an analysis turns the accepted understanding of the Necessary and Proper Clause on its head and, in effect, asserts that because Congress may pursue the general welfare through the Spending Clause, all laws that are necessary and proper to the general welfare must be considered constitutional under the Spending Clause. This argument, if

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the power to provide for the general welfare, generally referred to as the spending power."); *id.* at 291 ("Congress has the power to spend the funds that constitute the federal assistance. It can take the steps necessary and proper to protect those funds.").

> followed, would overturn the accepted meaning of the Spending and the General Welfare Clauses that has existed for nearly two centuries.[23]

Similarly, below, Judge Bye of the Eighth Circuit pointed out that, even conceding the "received wisdom" that "Congress enjoys broad powers to select the means of enacting its objectives," Section 666 nevertheless represents an unauthorized exercise of congressional power because it so "upsets the delicate balance between federal and state authority" that it cannot be regarded as constitutionally "proper."[24] In addition, the leading academic authority on Section 666 has expressed similar concerns, cautioning that "[t]aken to its limits, the combination of the spending power with the Necessary and Proper Clause could exceed" constitutional limits.[25]

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[23] *Lipscomb, supra* at 373-74 (opinion of Smith, J.) (footnote omitted).

[24] *Sabri,* 326 F.3d at 956 (Bye, J., dissenting). *See also* United States v. Morgan, 230 F.3d 1067, 1071 (8th Cir. 2000) (Bye, J., specially concurring).

[25] Brown, *New Federalism's Unanswered Question, supra*, at 510. It should be noted here that one of the counsel for *amicus curiae* advances, in an upcoming law review article, the argument that the Necessary and Proper Clause does not provide a sufficient constitutional basis for Section 666. Richard W. Garnett, *Federal Criminal Law, the Spending Power, and the New Federalism,* 89 CORNELL L. REV. ___ (forthcoming 2003).

It should also be noted that there is a rich, provocative, and growing literature devoted to the Necessary and Proper Clause, and that several leading scholars have contended that the Necessary and

Under current doctrine, the Spending Power permits Congress to promote, through spending, the general welfare as it understands it, without being subject to meaningful judicial review. Add to that mix, though, the claim that the Sweeping Clause authorizes direct regulation – even regulation not explicitly authorized elsewhere in Article I – so long as that regulation is rationally related to a federal "interest" in the unlimited goals and preferences it is permitted to promote through spending, and it is difficult, if not impossible, to see how the resulting federal regulatory power is anything but limitless.

That cannot constitute a correct statement of Congressional authority. It would be, to say the least, "strange if a 'proper' executory law – a law that is distinctively and peculiarly within the jurisdiction of the

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Proper Clause, correctly understood, imposes more demanding obligations on federal legislators than is sometimes supposed. *See, e.g.,* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Randy E. Barnett, *The Original Meaning of the Necessary & Proper Clause*, 6 U. PA. J. CONST. L. _____ (forthcoming 2003); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581 (2002); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107 (1998); Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L. J. 267 (1993). And, of course, James Madison famously reminded us that "[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress." 2 ANNALS OF CONG. 1898 (1791).

national government – could regulate subjects outside the careful, precise enumeration of regulable subjects found elsewhere in the Constitution."[26]

As former Chief Judge of the Eighth Circuit, Judge Richard S. Arnold, has observed, "[o]ur Constitution is a charter for a federal government of limited powers, and under this charter the States possess primary authority for defining and enforcing the criminal law." *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1996) (internal quotation marks and citation omitted).

In the same spirit, this Court has in recent years identified and enforced constitutional limits on Congress' power to expand federal regulatory power and jurisdiction. Still, in light of the federal government's regulatory enthusiasm, Congress can be expected increasingly to turn to the Spending Power to attempt through conditional spending grants what it cannot do directly.

However, such efforts could have grave implications for the federal structure of our Constitution, and for the liberty of individuals. As Justice Kennedy has noted, "the Spending Clause power . . . has the potential to obliterate distinctions between national and local spheres

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[26] Lawson & Granger, *Jurisdictional Interpretation, supra,* at 331; *see also, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State,* 107 HARV. L. REV. 1231, 1234 (1994) ("[T]he Necessary and Proper Clause, which the founding generation called the Sweeping Clause, [does not] grant general legislative powers to the national government.").

of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting).

While Article I of the Constitution grants Congress an expansive, sweeping power to promote the "general Welfare of the United States," the Constitution also imposes meaningful limits on the federal government's ability to use the spending power as a vehicle for expanding federal criminal jurisdiction over traditional state crimes. These limits – like the Constitution's other "structural" provisions – protect individual liberty in criminal cases by constraining government no less than do the Fourth, Fifth, and Sixth Amendment.

Nothing in Article I authorizes the United States to criminalize bribery merely because the corrupt transaction in question involves an agent of an organization that, somewhere, receives federal-program funds. Nor is this conclusion undermined by the well-established rule that Congress may, in effect, regulate the recipients of such funds, through the attachment to them of conditions. Those prosecuted under Section 666 are not Congress's contracting partners for purposes of conditional-spending doctrine; nor are Section 666 prosecutions of corrupt individuals by the United States obligations to which the recipients of federal-program funds could possibly be said to have agreed. The Sweeping Clause's occasional role as a constitutional catch-all cannot, consistent with "first

principles" of constitutional law, sustain the argument that Section 666 and its uses are valid as "necessary and proper" to the smooth functioning of federal programs aimed at promoting the General Welfare.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari in this case should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 03-44

In the Supreme Court of the United States

BASIM OMAR SABRI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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UNITED STATES OF AMERICA

vs.

BASIM OMAR SABRI

U.S.C.A. #:
District Court #: Criminal 01-246 RHK/JMM

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UNITED STATES OF AMERICA v.
BASIM OMAR SABRI

EIGHTH CIRCUIT COURT OF APPEALS
Court File No.: 02-1561 MN ST

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Brief of Appellee	[File Date 4-29-02]
Reply Brief	[File Date 5-08-02]
Eighth Circuit Court of Appeals Opinion	[File Date 4-07-03]
Order Staying the Mandate	[File Date 4-30-03]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CR 01-246 (RHK/JMM)

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

BASIM OMAR SABRI,
DEFENDANT.

DEFENDANT SABRI'S MOTION TO DISMISS THE INDICTMENT BECAUSE 18 U.S.C. § 666 IS UNCONSTITUTIONAL

Defendant, through his undersigned counsel, moves this Honorable Court for an Order dismissing the indictment filed against him because 18 U.S.C. § 666(a)(2) is unconstitutional on its face as it does not require a connection between the alleged bribe and the federal funds.

This motion is based upon all files and records in the case, attached Memorandum of Law, and upon other and further points and authorities as may subsequently presented to this Court.

Respectfully submitted,
BIRRELL & NEWMARK, LTD.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CRIMINAL NO. 01-246 (RHK/JMM)

UNITED STATES OF AMERICA,

Plaintiff,) UNITED STATES' RESPONSE
) TO DEFENDANT'S MOTION
) TO DISMISS BASED
) ONALLEGED
V.) UNCONSTITUTIONALITY OF
) 18 U.S.C. SECTION 666
)
BASIM OMAR SABRI,)
)
Defendant.)

* * * * *

In the present case, the evidence similarly will demonstrate that (1) Councilperson Herron, the "agent" of the local government involved, had direct influence over the federal funds received by Minneapolis and the MCDA, (2) those federal funds were directly related to economic development programs of the City and the MCDA, (3) the economic development programs of the City and the MCDA were directly involved in the real estate development that was being proposed by the defendant and (4) that the bribe payments and offers of the defendant sought to directly corrupt the operation of the city's economic redevelopment process and even sought to corruptly obtain the very funds that the federal government had provided to the City and the MCDA.

Thus, even if an additional nexus between the bribery conduct and the federal funds is required, the evidence in this case will easily meet such a standard. The defendant's motion should be denied.

Respectfully submitted,

THOMAS B. HEFFELFINGER
United States Attorney

Dated: 1/11/02

s/_____
BY: MICHAEL W. WARD
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Attorney ID No. 190755

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

Crim. No. 01-246 (RHK/JMM)
MEMORANDUM OPINION AND ORDER

Basim Omar Sabri,

Defendant.

Michael W. Ward, Assistant United States Attorney, Minneapolis, Minnesota, for Plaintiff.

Andrew S. Birrell and R. Travis Snider, Birrell & Newmark, Ltd., Minneapolis, Minnesota, for Defendant.

Defendant Basim Omar Sabri is charged in a three-count Indictment[1] with corruptly giving, offering, and agreeing to give things of value to Minneapolis City Councilmember Brian Herron with the intent of rewarding or influencing Herron in connection with various transactions of the City Council and the Minneapolis Community Development Agency

[1] Sabri has entered pleas of not guilty to each of the counts in the Indictment.

("MCDA"), all in violation of 18 U.S.C. § 666(a)(2). Before the Court is Sabri's Motion to Dismiss the Indictment on the grounds that 18 U.S.C. § 666 is unconstitutional on its face. For the reasons set forth below, the Court will grant the Motion.

Background

The following facts are alleged in the Indictment. Defendant Sabri is a property developer and landlord in the City of Minneapolis. (Indictment, ¶. 1.d.) During 2001, Sabri was pursuing a real estate development project within the Eighth Ward of the City of Minneapolis which involved a hotel and several commercial retail businesses. (Id.) The project contemplated zoning, eminent domain/ condemnation, licensing and funding actions by the City of Minneapolis ("the City"), the MCDA and the Minneapolis Neighborhood Revitalization Program (NRP).[2] (Id.) Through July 17, 2001, Herron was a member of the Minneapolis City Council representing the Eighth Ward[3]. (Id. ¶ 1.e.) His committee assignments

[2] The NRP is an entity formed by the City of Minneapolis and other local governmental entities to provide funding for the economic revitalization of Minneapolis neighborhoods through neighborhood steering committees. The NRP is wholly funded by the MCDA and its affairs are managed by the NRP Policy Board, which includes the Mayor of the City of Minneapolis and members of the Minneapolis City Council. (Indictment ¶ l.c.)

[3] On July 17, 2001, Herron entered a plea of guilty to one count of Extortion Under Color of Official Right in violation of 18 U.S.C. § 1951. The conduct underlying the charge to which Herron pleaded guilty involved a different transaction and different individuals than are involved in the Indictment here, and nothing in this Memorandum Opinion and Order affects the validity of the charge against Herron or his plea of guilty. See United States v. Vong, 171 F.3d 648, 654 (8th Cir. 1999) (rejecting challenge to constitutionality of 18 U.S.C. § 1951).

included the Ways and Means/ Budget, Public Safety and Regulatory Services, and Health and Human Services committees. (Id.) As a member of the City Council, Herron also served as a member of the Board of Commissioners of the MCDA, overseeing the actions and budget of that agency. [4] (Id.)

Count I of the Indictment alleges that, from July 2 through July 17, 2001, Sabri corruptly sought Herron's assistance in obtaining regulatory approvals from the City of Minneapolis for the above-described commercial real estate development project. (Id. ¶ 3.) Sabri allegedly gave or offered Herron $5,000 with the intent to influence or reward him in connection with such transactions. (Id.)

Count II of the Indictment alleges that, from July 2 through July 17, 2001, Sabri corruptly sought Herron's attendance at a meeting with private business

[4] The MCDA has an Executive Director, appointed by the Mayor of the City of Minneapolis, and is governed by a Board of Commissioners that is composed of the thirteen elected members of the Minneapolis City Council. (Indictment ¶ l .b.)

owners who owned property necessary for Sabri's commercial development project. (Id. ¶ 5.) Count II also alleges that Sabri corruptly sought Herron's threat at that meeting to use the City's power of eminent domain to take the business owners' property unless they sold to Sabri. (Id.) Sabri allegedly offered or agreed to give Herron $10,000 with the intent of influencing or rewarding Herron for his actions. (Id.)

Count III of the Indictment alleges that from July 7 through July 17, 2001, Sabri corruptly sought Herron's assistance in obtaining $800,000 in community economic development grants from the City, the MCDA, and other entities for his commercial real estate development project. (Id. ¶ 7.) Sabri allegedly offered or agreed to give Herron $80,000 (a 10% commission) with the intent of influencing or rewarding Herron in connection with his assistance. (Id.)

During the one-year period beginning January 1, 2001, the City of Minneapolis was expected to receive (and the City Council was expected to administer) approximately $28.8 million in federal assistance. (Id. ¶ l.a.) During that same one-year period, the MCDA was expected to receive and administer federal assistance in the form of Community Development Block Grants and other federal programs of approximately $23 million. (Id. ¶ l .b.)

Analysis

As noted above, all three counts of the Indictment charge Sabri with violating 18 U.S.C. § 666(a)(2). That section provides, in relevant past, that if a local government, or any agency thereof, "receives, in

any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," see 18 U.S.C. § 666(b), then it is a crime against the United States for any person to

> corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward an agent of . . . a . . . local . . . government, or any agency thereof, in connection with any business, transaction, or series of transactions of such... government, or agency involving anything of value of $5,000 or more.

18 U.S.C. § 666(a)(2).

Sabri argues that the federal statute is unconstitutional on its face because it does not require a connection between the alleged criminal conduct -- the giving or offering of a bribe -- and the federal funds distributed by Congress. Without the requirement of such a connection, Sabri contends, the statute lies outside the scope of Congress's authority to enact laws under the Spending Clause of Article I of the United States Constitution. This Court begins its analysis by construing § 666(a)(2) to determine whether it does or does not require a connection between the bribe and the expenditure of federal funds. If the statute does not require such a connection, the Court will then consider whether. Congress validly exercised its legislative authority in enacting § 666(a)(2).

I. The Essential Elements of Giving, Offering or Agreeing to Give A Bribe in Violation of § 666(a)(2)

In Salinas v. United States, 522 U.S. 52, 56-57 (1997), the United States Supreme Court construed the complementary provision of § 666 which makes it a federal offense for an agent of an organization or a state, local, or tribal governmental body or agency that receives more than $10,000 in federal funds in a year to solicit, demand, accent; or agree to accept anything of value with the intent to be influenced or rewarded in connection with any business, transaction, or series of transactions of the entity valued at $5000 or more. 18 U.S.C. § 666(a)(1). Given the parallel wording in the provision criminalizing the taking of a bribe (18 U.S.C. § 666(a)(1)(B)) and in the provision criminalizing the giving or offering of a bribe (18 U.S.C. § 666(a)(2)), this Court first looks to Salinas for guidance in construing § 666(a)(2).

Salinas, a deputy sheriff in Hidalgo County, Texas, was responsible for managing the county jail and supervising the custody of prisoners. 522 U.S. at 55. He accepted bribes from a federal prisoner housed at the jail pursuant to an arrangement negotiated between the United States Marshals' Service and the county; in exchange for the bribes, the prisoner was permitted "contact visits" with his wife and a girlfriend. Id. Salinas argued to the Supreme Court that, under § 666(a)(1)(B) the government must prove, as an element of the crime of taking a bribe, that "the bribe in some way affected federal funds, for instance by diverting or misappropriating them." Id.

In evaluating Salinas' argument, the Supreme Court focused on the clause "[a]ny business, transaction, or series of transactions," which is found both in § 666 (a)(1)(B) and in § 666(a)(2). Reasoning that the word "any" means "any," without qualification, and that "[t]he statute applies to all cases in which an `organization, government, or agency' receives [$10,000 or more] of benefits under a federal program," id. at 57 (emphasis added) (citing 18 U.S.C. § 666(b)), the Court rejected Salinas' proposed statutory construction. The statute's prohibition against accepting a bribe with the intent of being influenced or rewarded in connection with any business transaction, or series of transactions "is not confined to a business or transaction that affects federal funds." Id. Indeed, the Supreme Court observed that § 666 (a)(1)(B)'s language was "expansive" and "unqualified ... both as to the bribes forbidden and the entities covered." Id. at 56 (emphasis added).

Also rejected was Salinas' contention that the Supreme Court could not construe § 666(a)(1)(B) to apply to bribes having no affect on federal funds without "a plain statement of congressional intent," as required by Gregory v. Ashcroft, 501 U.S. 452 (1991), and McNally v. United States, 483 U.S. 350 (1987). The Supreme Court distinguished Gregory and McNally on the grounds that, "[i]n each of those cases, we confronted a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state power." 522 U.S. at 59. Here, however, "[t]he text of § 666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction." Id. at 60 (emphasis added). Accordingly, the Supreme Court

held that "as a matter of statutory construction, § 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds." Id. at 61 (emphasis added).

It appears that Salinas, § 666(a), as construed, was a proper exercise of the legislative powers vested in Congress by Article I of the Constitution. The Supreme Court did decide, however, that the statute was constitutional as applied to the facts of the case. In reaching that conclusion, it observed-that the "preferential treatment accorded to [a federal prisoner in the county jail] was a threat to the integrity and proper operation of the federal program." Id. at 60-61.

While the Salinas Court held that § 666(a)(1)(B) did not "require the Government to prove that the bribe in question had any particular influence on federal funds," id. at 61, it expressly left open the question of "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." Id. at 59. After Salinas, two federal courts of appeal have concluded that there must be proof of a connection between the bribe and the expenditure of federal funds.[5] This Court evaluates each appellate court decision in turn.

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[5] By contrast, the United States Court of Appeals for the Sixth Circuit held that § 666 "requires no relationship between the illegal activity and the federal funding." See United States v. Dakota, 197 F.3d 821, 826 (6th Cir. 1999). In reaching this conclusion, however, the Sixth Circuit did not engage in any extended analysis of either the statute or the Salinas decision.

The Second Circuit Court of Appeals in United States v. Santopietro

In United States v. Santopietro 166 F.3d 88 (2d Cir. 1999), cert. denied, 510 U.S. 1092 (1994), the Government appealed from a revised sentence that the district court had imposed on Santopietro after vacating his conviction for crimes charged under § 666. Santopietro, 166 F.3d at 90. Santopietro, formerly the Mayor of Waterbury, Connecticut, had been charged with violating § 666(a)(1)(B) by engaging in "a scheme whereby [he] used his political position to influence decisions by various city agencies in return for bank loans and cash payoffs from certain local businessmen." Id. at 91. Santopietro used his influence to further to interests of various real estate developers and accepted both rewards for having used his influence and inducements to use his influence. Id. During the operation of this scheme, the City of Waterbury received substantial federal funds for housing, urban development and other programs within the purview of the land use board, the water department, the zoning commission, and the fire marshal. Id. at 93. "Although large amounts of money flowed to individuals through corrupt means, there was no obvious or direct financial loss to the City of Waterbury itself." Id. at 91.

Prior to the Supreme Court's decision in Salinas, the Second Circuit had held that "the $5,000 or more required to be involved in the transaction must be worth at least that amount to a recipient of federal funds." United States v. Foley, 73 F.3d 484, 492-93 (2d Cir. 1996). The Santopietro court acknowledged that, in light of Salinas,

to whatever extent Foley required that the bribe directly affect the disbursement or other use of federal funds, such a construction of the statute must now be discarded. Equally to be cast aside is a construction of the statute that imposes limitations on the "anything-of-value" element, beyond the requirement that the transaction, in connection with which the accepter of corrupt payments intended to be influenced, involves anything of value of $5000 or more. Thus, to the extent that Foley required the Government to plead and prove that the transaction involved something of value to the governmental entity that received the requisite amount of federal funds, that narrowing construction of the statute must also be discarded.

166 F.3d at 92-93 (emphasis in original).

Evaluating whether Santopietro's conviction under § 666(a)(1) was permissible after the Supreme Court's decision in Salinas, the Second Circuit first discussed the statutory requirements of the offense: the court of appeals observed that the City of Waterbury had received more than $10,000 in the relevant years and the corrupt transactions had exceeded $5000 in value. It then evaluated a "requirement of Foley" that it concluded had survived the Supreme Court's holding in Salinas: "that the transaction sought to be influenced had some connection with a federal program." Id. at 93 (citing Foley, 73 F.3d at 493). In considering this "requirement" -- based on its own prior decision in Foley rather than the text of the statute -- the Second Circuit reasoned that "[i]ndeed, Salinas may be read to indicate that the `threat to the integrity and proper operation of

[a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied." Id. Applying this "requirement" from Foley, the Second Circuit found that because

> federal funds were received by Waterbury for housing and urban development programs and the corrupt payments concerned real estate transactions within the purview of the agencies administering federal funds, the requisite connection between the bribes and the integrity of federally funded programs is satisfied.

166 F.3d of 93.

The Third Circuit Court of Appeals in United States v. Zwick

In United States v. Zwick, 199 F.3d 672 (3d Cir. 1999), the defendant, an elected member of a township board of commissioners, appealed from his conviction for bribery under § 666(a)(1)(B). Zwick, 199 F.3d at 675. Zwick argued that the trial court misinterpreted § 666 when it upheld his conviction without proof of a connection between the solicitation and taking of bribes and federal funds or programs. Id. at 675-76.

Before analyzing the issue raised by Zwick on appeal, the Third Circuit reviewed the case law that had developed around § 666.

> Prior to the enactment of § 666 in 1984, the limited scope of the federal bribery statute and general theft of property statute hampered the

> federal government's efforts to reach crimes affecting federal interests due to tracing requirements and limitations on application to non-federal employees. See 18 U.S.C. §§ 201, 641. By its terms, § 666 fills these particular voids: it imposes no title or tracing requirements and covers non-federal employees.

Id. at 679 (emphasis added). With respect to the case law construing § 666 prior to Salinas, the court of appeals observed that some courts had been reluctant to uphold convictions under § 666 where there was no proof of a federal interest in the corrupt act; these courts had reasoned that "interpreting § 666 to have no federal interest requirement would make a federal offense out of routine local bribery, dramatically changing the state-federal balance without an express Congressional directive that it intended to do so." Id. at 680. After reviewing the Salinas decision, the Third Circuit discussed the post Salinas split in authority that had emerged regarding whether the government must prove, in a prosecution under § 666, that a federal interest was implicated by the corrupt acts. Id. at 681-82.

The Third Circuit began its analysis with the statutory language itself and concluded that "[t]he language does not state explicitly that the government must show a connection between the bribe and federal interests." Id. at 682. Finding no requirement of such a connection in the plain language of § 666(a)(1)(B), the Third Circuit turned to the statute's title -- "Theft or bribery concerning programs receiving Federal funds" -- finding that the title "implies that a federal connection is anticipated." Id. The Third Circuit thus concluded

that § 666(a)(1)(B) was ambiguous, presenting two alternative interpretations:

> The most literal interpretation -- that the statute lacks a federal connection requirement -- is troubling from an interpretative standpoint in that it broadens the range of activity criminalized by the statute and alters the existing balance of federal and state powers by encompassing acts already addressed under state law in which the federal government may have little interest. We cannot embrace such a broad reading of this criminal law unless that is the clear directive from Congress.

Id. at 682-83. The Zwick court therefore turned to the legislative history for guidance as to Congress's intent and concluded that Congress did not intend "to make § 666 applicable when no federal interest is implicated by certain offense conduct." Id. at 686. Before reaching its holding that § 666 requires that the government prove a federal interest is implicated by the defendant's offense conduct," id. at 687, the Third Circuit observed that

> [i]nterprefing § 666 to have no federal interest requirement produces serious concerns as, to whether Congress exceeded its power under the Spending Clause in enacting this statute. To pass muster under the Spending Clause, legislation regulating behavior of entities receiving federal funds must, among other things, be based upon a federal interest in the particular conduct. Applying § 666 to offense conduct, absent evidence of any federal interest

> would appear to be an unconstitutional exercise of power under the Spending Clause.

Id. at 687 (internal citations omitted). The Third Circuit therefore justified its holding on the grounds that, "when a statute is unclear, we will construe it so as to avoid constitutional concerns, assuming that such construction does not amount to a rewriting of the statute." Id.

> ***The essential elements of the crime defined in § 666(a)(2) do not include proof of a connection between the offense conduct and the expenditure of federal funds.***

The Eighth Circuit Court of Appeals has not addressed whether a prosecution under § 666 requires proof of a connection between the giving or taking of bribes and the federal government's expenditure of funds and, if so, the nature of that connection. Judge Kermit Bye, however, recently considered the Zwick and Santopietro opinions and found the approach taken by those courts to be "fundamentally flawed." United States v. Morgan, 230 F.3d 1067, 1072-73 (8th Cir. 2000) (Bye, J., concurring). The Second and Third Circuits clearly sought to avoid the constitutional problems they perceived with what the Supreme Court had described as § 666's "expansive, unqualified language, both as to the bribes forbidden and the entities covered." Salinas, 522 U.S. at 56. Judge Bye described the Zwick and Santopietro opinions as "reading into" the text of § 666 the requirement of a "connection" not found in the language of the statute itself. Morgan, 230 F.3d at 1073. He further observed

that the actions of the Second and Third Circuits are contrary to the Supreme Court's repeated admonitions that

> [c]ourts in, applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.

Id. (quoting United States v. Albertini, 472 U.S. 675, 680 (1985) which is quoted in Salinas, 522 U.S. at 57 & 59-60). Judge Bye's analysis and criticisms of Zwick and Santopietro are well-founded.

The Salinas Court admonished that "[n]o rule of construction [. . .] requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope." Salinas, 522 U.S. at 59 (quoting United States v Raynor, 302 U.S. 540, 552 (1938)). That, however, is precisely what the courts of appeals in Zwick and Santopietro did. The Third Circuit in Zwick focused on the statute's title to find an ambiguity that would justify using § 666's legislative history to fashion a connection requirement

for the statute, which is silent in that regard.[6] This approach fails to take into account a long-standing principle of statutory construction that a title cannot control the plain words of the statute.[7] See 2A J.G. Sutherland, Statutes and Statutory Construction § 47.03 (1st ed. 1891). The Third Circuit also sidestepped the Salinas Court's conclusions that the clause "any business, transaction, or series of transactions" is unambiguous, and the term "any" is without limitation. Furthermore, the court of appeals in Zwick did not address the fact that the text of § 666(a)(1)(B) does not mention programs of an organization, state, local, or tribal government, or governmental agency that receive federal funding. The only limitation on the statute' application, set out in § 666(b), is that the entity whose business the bribe was intended to influence must receive more than $10,000 in a year from a federal program. Under Salinas, § 666(a)(1)(B) cannot be restricted to bribes tending to influence the "business, transaction, or series of transactions" of programs receiving federal funding. The Third Circuit's reading of § 666(a)(1)(B) strains the plain meaning of the words and excludes from the scope of the statute conduct that clearly falls within it.

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[6] The Supreme Court in Salinas, while briefly discussing the historical context surrounding the enactment of § 666, did not rely upon the legislative history to construe the statute.

[7] This Court further notes that the Supreme Court, in Salinas, did not consider the title of § 666 in construing the statute. It focused solely on the text of § 666(a)(1)(B) and found the relevant language to be unambiguous.

The Second Circuit in Santopietro derived its "connection" requirement -specifically, that the transaction to be influenced have some connection with a federal program -- from its pre-Salinas holding in United States v. Foley. The Second Circuit also focused on the fact that the Court had indicated that the offense conduct there, the bribes received by the deputy sheriff from the federal prisoner, had posed a "threat to the integrity and proper operation of a federal program." It thereby avoided the question of

> whether Santopietro's role as mayor -- the chief executive officer of the city and hence the officer ultimately responsible for, all city departments -- would render the statute applicable to corrupt payments received by him for any transaction involving the city, even though the federal funds were received for a program entirely unrelated to the program in connection with which the corrupt payments were made.

Santopietro, 166 F.3d at 94 n.3 (emphasis added). This footnote again does not account for the fact that the Salinas Court had construed the clause "any business, transaction, or series of transactions" to be unqualified. Indeed, according to the Supreme Court, "[t]he statute applies to all cases in which an `organization, government, or agency' receives [$10,000 or more] of benefits under a federal program." Salinas, 522 U.S. at 57 (emphasis added). Section 666(a)(1)(B), as construed by Salinas, applied to Mayor Santopietro for bribes tending to influence any transaction of City of Waterbury, so long as the city received $10,000 or more of benefits under a federal program. Recognizing that such a reading would present constitutional problems,

however, the Second Circuit read into the statute a "connection" requirement not found in the text itself.

This Court is not persuaded by these two appellate court decisions, which read a "connection" requirement into the essential elements of a charge under § 666. The text of § 666(a)(2) cannot support the existence of a "connection" requirement as one of the elements of the offense without qualifying the word "any" in the phrase "in connection with any business transaction, or series of transactions" -- a phrase the Supreme Court has determined to be unqualified and unambiguous. Therefore, the essential elements the government must prove in order to convict a defendant of giving, offering or agreeing to give a bribe to influence an agent of an organization, government, or governmental agency in violation of § 666(a)(2) are as follows:[8]

1. The defendant offered or gave a thing of value to another person;

2. The thing of value was offered or given in connection with any business, transaction, or series of transactions of an organization, or of a local government, or any agency thereof;

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[8] These elements of the offense are consistent with the proposed jury instructions submitted by the government for use in this case. See also Eighth Circuit Model Criminal Jury Instruction 6.18.666B and 6.18.666C (2002)

3. The business, transaction, or series of transactions in question involves something valued at $5000 or more;

4. The defendant intended the thing of value to influence or reward an agent of such organization, government, or governmental agency in connection with the business, transaction, or series of transactions in question; and

5. The organization, government, or governmental agency in question received, in any one year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance.

Because § 666(a)(2) does not require the government to prove a connection between the offense conduct and the expenditure of federal funds,[9] the remaining issue is whether the statute, as now construed by this Court, is a constitutional exercise of Congress's powers under the Spending Clause.

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[9] Therefore, the government's argument in its opposition memorandum that it could establish a connection between the bribes allegedly offered by Sabri and the expenditure of federal funds is irrelevant. The statute does not require proof of such a connection in order for the government to establish that a crime, as defined in § 666, has been committed.

II. The Constitutionality of § 666(a)(2) under the Spending Clause

Federal courts are courts of limited jurisdiction, possessing only such powers as are authorized by the Constitution and by Acts of Congress. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). The power of Congress to enact legislation is limited to the enumerated powers found in Article I of the Constitution. See generally New York v. United States, 505 U.S. 144, 158-59 (1992) (discussing constitutional limitations on Congress's power to legislate). The Spending Clause in Article I authorizes Congress to spend federal funds "to provide for the general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. The government argues that (a) the statute itself, in § 666(b), confers federal jurisdiction for prosecution and (b) Congress has properly enacted § 666 under the Spending Clause.[10]

The government argues that § 666(b) -- which states that the statute applies whenever an organization, state, local, or tribal government, or governmental agency in question has received at least $10,000 from a federal program -- constitutes an "express jurisdictional element" that confers federal court jurisdiction over the

[10] The government has not argued that Congress enacted § 666 pursuant to the exercise of legislative power under the Commerce Clause; therefore, this Court will not consider that issue.

offenses described in § 666.[11] See United States v. Lopez, 514 U.S. 549, 561 (1995): In Lopez, the Supreme Court considered whether the Gun-Free School Zones Act of 1990 was unconstitutional because it had been enacted outside the scope of Congress's powers under the Commerce Clause. 514 U.S. 559-67. In determining the Act's constitutionality, the Court evaluated whether 18 U.S.C. § 922(q) contained a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 561. The Supreme Court concluded

[11] The government's assertion that § 666(b) limits the statute's applicability to "entities receiving a threshold amount of federal funding and to agents of those entities receiving federal funds," (Gov't Br. at 3-4), seriously mischaracterizes the statute. The criminal provisions of § 666(a) are triggered whenever an organization, or a state, local, or tribal government, or any agency thereof, receives at least $10,000 in federal funds in a year. 18 U.S.C. § 666(b). The statute applies, however, not only to agents of the entity receiving the funds, 18 U.S.C. § 666(a)(1), but also, as the Indictment in this case against Sabri demonstrates, to any person offering something of value with the intent of influencing or rewarding an agent of the entity receiving the federal funds in connection with any business of that entity. 18 U.S.C. § 666(a)(2). Nor does § 666(a)(2) require the agent to be the direct recipient of the bribe; under that provision, it is a crime to offer something of value to any other person with the intent of influencing or rewarding an agent of the entity receiving the government's funds.

that § 922(q) had "no express jurisdictional element which might limit its reach to a, discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Id. at 562 (emphasis added).

Similarly, § 666 does not require that the offense conduct (in this case, the giving or offering of bribes) have an effect on the federal funds disbursed to local government. Salinas, 522 U.S. at 60-61. There is no statutory element, as established above, that requires proof on a case-by-case basis that the alleged bribery has an explicit connection to any federal funds distributed to the receiving entity. The Third Circuit in Zwick correctly pointed out that § 666 "imposes no title or tracing requirements." 199 F.3d at 679. Section 666 is plainly distinguishable from other criminal statutes containing an "express jurisdictional element"; section 666(b) does not directly link a defendant's wrongdoing to the subject over which Congress has power -- the expenditure of federal funds. See generally, George D. Brown, Stealth Statute - Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666, 73 Notre Dame L. Rev. 247, 293-94 (Jan. 1998). The Court rejects the government's argument that § 666(b) is an "express jurisdictional element" that limits the statute's reach and constitutes a proper conferral of federal jurisdiction.

The government also argues that, under South Dakota v. Dole, 483 U.S. 203 (1987), § 666 is a valid exercise of legislative power under the Spending Clause because it is merely a "condition" which Congress may attach (incident to its spending power) on an entity's receipt of federal funds. In Dole, the Supreme Court

held that Congress could indirectly bring about the establishment of a uniform minimum drinking age among the States by enacting a statute that directed the Secretary of Transportation to withhold a small percentage of federal highway funds from those States allowing the purchase or possession of alcohol by individuals under twenty-one years of age. 483 U.S. at 206. "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives." Id. The Dole Court recognized, however, that Congress's power under the Spending Clause is subject to several general restrictions, including limitations that (1) the power must be used in pursuit of the general welfare; (2) Congress must state the condition it is placing on the federal funding unambiguously; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions must not violate other independent constitutional restrictions. Id. at 207-08.

This Court finds unpersuasive the government's argument that Congress's enactment of § 666 is justified under the standard announced in Dole. As a threshold matter, § 666 is not really a "condition" statute. Congress clearly stated the conditions upon which States could receive all of the available federal highway funds. See Dole, 483 U.S. at 208 (citing 23 U.S.C. § 158). Section 666, however, does not similarly condition a state or local government, or governmental agency's, receipt of federal funds. Section 666 "neither requires a state's compliance with federal regulatory or administrative directives, nor prevents state action."

United States v. Cantor, 897 F. Supp. 110, 113 (S.D. N.Y. 1995). Furthermore, the statute does not apply to the recipient government or organization; it applies to the "agents" of the recipient and private parties.

The Supreme Court has long observed that congressional power under the Spending Clause is similar to the power existing between parties to a contract.

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

Pennhurst, 451 U.S. at 17. The government's contention that "[a] local government may easily remove its officers and agents from coverage under 18 U.S.C. § 666 by simply declining any federal aid or only accepting de minimus aid" (Gov't's Br. at 7) would suggest that there is some sort of contractual quid pro quo supporting the enactment of § 666 under the Spending Clause. The argument in fact demonstrates that § 666 is an "unbargained-for" intrusion into state criminal jurisdiction.

In Dole, South Dakota stood to lose only "5% of the funds otherwise obtainable under specified highway grant programs" if it adhered to a minimum drinking age of nineteen. Dole, 483 U.S. at 211 (emphasis added). Given the small percentage of funds at stake, the Dole

Court had found the state's arguments that the highway funding statute was "coercive" to be mere rhetoric. Id. The "choice" posed by the government here is much more dire. To cut the "string" of § 666, the City of Minneapolis must decide to forego approximately 99.97% of the federal funds [12] it otherwise obtains annually through federal programs.[13] Similarly, the MCDA must decide to forego approximately 99.96% of the federal funds[14] it otherwise obtains annually through federal programs in order to untangle itself from the "string" of § 666. Thus, even if one could describe the federal funds disbursed to the City of Minneapolis and MCDA as the "financial inducement" by which Congress bargained for federal jurisdiction

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[12] That percentage represents all but $10,000 of the $28.8 million in federal funding the City received during calendar year 2001. (See Indictment ¶ 1.a.)

[13] Even if the City of Minneapolis or the MCDA made that "simple" decision, such a course of action would not immediately remove anyone from the scope of § 666; the "one year period" for determining whether the statutory minimum amount of federal funds have been received begins no earlier than twelve months before the commission of the offense and extends no later than twelve months after the commission of the offense. See 18 U.S.C. § 666(d)(5). Thus, long after the federal funds had been cut off, the City and the MCDA could still find both their "agents" and third parties subject to federal criminal prosecution.

[14] This percentage represents all but $10,000 of the $23 million in federal funds the MCDA allegedly received during calendar year 2001. (See Indictment ¶ 1.b.)

over offenses traditionally within the purview of state and local governments, that bargain surely is "so coercive as to pass the point at which pressure turns into compulsion." Dole, 483 U.S. of 211.

Section 666 plainly is not a "condition" statue within the reasoning of Dole and cannot be justified under that decision as a valid exercise of Congress's power under the Spending Clause.[15] Viewing § 666 in light of Dole and Pennhurst, Judge Bye has observed that

> Congress did not contract with states or local governments. Neither did Congress bestow gifts of funds upon those governments. Rather, Congress passed a federal criminal statute designed to punish conduct that falls within the domain of traditional state concerns (bribery, embezzlement, fraud, etc.). Section 666 reaches beyond punishment of the state and local governments who receive those funds to proscribe the conduct of third persons who aren't parties to the funding contract.

Morgan, 230 F.3d at 1074 (emphasis added). This Court finds Judge Bye's observations about the Spending Clause shortcomings of § 666 to be germane and persuasive.[16]

"Under our federal system, the states possess primary authority for defining and enforcing the criminal law." Lopez, 514 U.S. at 561 n.3 (internal quotation marks omitted). The Minnesota Legislature has declared it a felony to give, offer, or promise to give to any public officer or public employee,[17] either directly

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[15] If § 666 were a condition statute, it would not appear to satisfy the relatedness limitation on legislative power under the Spending Clause. That limitation requires that the condition Congress imposes on the federal funds must bear some relationship to the purpose of the federal spending. See New York v. United States, 505 U.S. 144, 167 (1992); Dole, 483 U.S. at 207-08. The government argues that the purpose of § 666 is to protect the "integrity of organizations or agencies that receive federal funds." (Gov't Br. at 4.) Such a connection between the federal spending and the enactment of § 666 is too attenuated since, under that rationale, the government could prosecute a city meat inspector for taking bribes of over $5,000 (thereby compromising the integrity of city government) even if the inspector has no contact with or control over funds received by the city from the federal government.

[16] The Court recognizes that Judge Bye's concurring opinion in Morgan is dicta and does not control the issue presented here. It is, however, something more than mere "musings." (See Gov't's Br. at 6 n.1.)

[17] For purposes of Minnesota's bribery statute, a "public officer" is defined to include "a member of the legislature or of a governing board of a county, municipality, or other subdivisions of the state, or other governmental instrumentality within the state." Mine. Stat. § 609.415, subd. 1(1)(b). A "public employee" is defined as "a person employed by or acting for the state or a county, municipality, or other subdivision or governmental instrumentality of the state for the purpose of exercising their respective powers and performing their respective duties, and who is not a public officer." Id., subd. 1(2).

or indirectly, any benefit, reward, or consideration to which that officer or employee is not legally entitled with the intent of influencing that person's performance of his or her powers or duties. Minn. Stat. § 609.42.[18] The federal punishment of the same conduct under § 666(a)(2) is an intrusion into the state's primary authority and is based solely upon a state or local governmental entity's receipt of a modest amount of federal funds. The following passage, quoted in Morgan, has resonance here:

> . . . Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. Federal dominion over federal property is irrelevant, because once any particular funds have been given to a recipient, those funds are not federal property anymore. The Constitution does not contemplate that federal relatory power should tag along after federal money like a hungry dog.

Morgan, 230 F.3d at 1074 (quoting David E. Engdahl, The Spending Power, 44 Duke L.J. l, 92 (Oct. 1994)) (emphasis added in concurring opinion). Without a requirement that the government prove that the alleged bribery has some connection to the federal funds disbursed by Congress, which this Court has

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[18] The constitutional deficiencies this Memorandum Opinion and Order has discussed with respect to 18 U.S.C. § 666(a)(2) have no application to Minnesota's bribery statute.

determined is not present in the statute, 18 U.S.C. § 666(a)(2) is an unconstitutional exercise of Congress's power under the Spending Clause. Accordingly, the Indictment here, based solely on § 666(a)(2), must be dismissed.

Conclusion

Section 666(a)(2) does not require proof by the prosecution of a connection between the offense conduct and the expenditure of federal funds. Section 666 does not contain an "express jurisdictional requirement" that limits the statute's reach to cases in which the alleged bribery has an explicit connection to any federal funds distributed to the receiving entity. Thus, it does not contain a proper conferral of federal jurisdiction, as discussed in United States v. Lopez, 514 U.S. 549 (1995). Nor does § 666 impose a "condition" on the grant of federal funds, as discussed in South Dakota v. Dole, 483 U.S. 203 (1987). Therefore, § 666(a)(2) is an unconstitutional exercise of Congress's legislative power under the Spending Clause of Article I of the United States Constitution.

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS ORDERED** that Defendant Basim Omar Sabri's Motion to Dismiss the Indictment Because 18 U.S.C. § 666 is Unconstitutional (Doc. No. 43) is **GRANTED**. The Indictment (Doc. No. 1) is hereby **DISMISSED**.

January 28, 2002

s/_____
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

Basim Omar Sabri,

Defendant.

Crim. No. 01-246 (RHK/JMM)
ORDER

Page eight of this Court's Memorandum Opinion and Order dated January 28, 2002 (attached as Exhibit A hereto) contains the full citation to the Second Circuit Court of Appeals' 1999 decision in United States v. Santopietro. That citation erroneously included the Supreme Court's decision to deny certiorari with respect to the court of appeals' 1993 opinion deciding the defendants' direct appeal of their conviction.

The Clerk of Court is hereby directed to **SUBSTITUTE** a corrected page eight (attached as Exhibit B hereto) for the original page eight of the Memorandum Opinion and Order:

January 28, 2002

s/_____
RICHARD H. KYLE
United States District Judge

EXHIBIT A

While the Salinas Court held that § 666(a)(1)(B) did not "require the Government to prove that the bribe in question had any particular influence on federal funds." id, at 61, it expressly left open the question of "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." Id at 59. After Salinas two federal courts of appeal have concluded that there must be proof of a connection between the bribe and the expenditure of federal funds.[5] This Court evaluates each appellate court decision in turn.

The Second Circuit Court of Appeals in United States v. Santopietro

In United States v. Santopietro, 166 F.3d 88 (2d Cir. 1999), cert. denied, 510 U.S. 1092 (1994), the Government appealed from a revised sentence that the district court had imposed on Santopietro after vacating his conviction for crimes charged under § 666. Santouietro, 166 F.3d at 90. Santopietro, formerly the Mayor of waterbury, Connecticut, had been charged with violating § 666(a)(1)(B) by engaging in "a scheme whereby [he] used his political position to influence

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[5] By contrast, the United States Court of Appeals for the Sixth Circuit held that § 666 "requires no relationship between the illegal activity and the federal funding." See United States v. Dakota 197 F.3d 821, 826 (6th Cir.1999). In reaching this conclusion, however, the Sixth Circuit did not engage in any extended analysis of either the statute or the Salinas decision.

decisions by various city agencies in returns for bank loans and cash payoffs from certain local businessmen." Id. at 91. Santopietro used his influence to further the interests of various real estate developers and accepted both rewards for having used his influence and inducements to use his influence. Id. During

* * *

EXHIBIT B

While the Salinas Court held that § 666(a)(1)(B) did not "require the Government to prove that the bribe in question had any particular influence on federal funds," id at 61, it expressly left open the question of "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." Id at 59. After Salinas, two federal courts of appeal have concluded that there must be proof of a connection between the brine and the expenditure of federal funds.[5] This court evaluates each appellate court decision in turn.

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Supreme Court, U.S.
FILED
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No. 03-44

In the Supreme Court of the United States

BASIM OMAR SABRI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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50 A

QUESTIONS PRESENTED

Does 18 U.S.C. § 666(a)(2) criminalize acts of bribery lacking a nexus to a federal interest, and does it exceed Congress' limited power under the Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 326 F.3d 937 (CA8 2003). The decision of the District Court is reported at 183 F. Supp. 2d 1145 (D. Minn. 2002).

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on April 7, 2003. Pet. App. A1. The Petition for Writ of Certiorari was filed on July 2, 2003, and was granted on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 8, clause 1 of the United States Constitution provides, "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

2. Article 1, Section 8, clause 18 of the United States Constitution provides, "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

3. The Tenth Amendment to the United States Constitution provides, "The Power not delegated

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

4. 18 U.S.C. § 666 (2000) states:

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

* * *

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

* * *

(d)(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

STATEMENT OF THE CASE

1. Petitioner Basim Omar Sabri is a private citizen who works as a property developer and landlord in the City of Minneapolis, a local government within the State of Minnesota. Pet. App. A64. This federal criminal case arose out of a local development that Sabri proposed at Second Avenue and Lake Street within the City. *Ibid.* The development envisioned constructing a hotel and other commercial retail enterprises that would have required zoning, eminent domain/condemnation, licensing, and funding actions by the City and two local agencies. *Ibid.*

The Government indicted Sabri in August 2001 on three counts of offering a bribe in violation of 18 U.S.C. § 666(a)(2). Pet. App. A63-A66. To meet the elements of the offense, the indictment alleged (1) that Sabri on three occasions offered a bribe with the intent to influence Brian Herron, an agent of the City, in connection with the development; (2) that in 2001, the City received greater than $10,000 in federal benefits; and (3) that Sabri intended to influence Herron in connection with business of the City worth at least $5,000. *Id.*, at A64-A66.

2. In addition to the facts necessary to prove the offense under § 666(a)(2), the indictment further alleged certain background facts. In calendar year 2001, the City of Minneapolis received and administered about $28.8 million dollars of federal assistance. *Id.*, at A63. The City is governed by a mayor and a 13-member City Council, and Herron was a member of the Council. *Ibid.* His committee assignments within the Council gave him a measure of authority over Sabri's development project, including through the Ways and Means/Budget; Public Safety

and Regulatory Services; and Health and Human Services committees. *Id.*, at A64.

By virtue of his Council seat, Herron was also an officer of two local agencies with responsibilities that related to Sabri's development. *Ibid.* First, Herron was a member of the Board of Commissioners of the Minneapolis Community Development Agency (MCDA), an entity created by the Minneapolis City Council to fund housing and economic redevelopment in Minneapolis. The MCDA and its programs received approximately $23 million of federal funds in the calendar year 2001 through Community Development Block Grants and other federal programs. *Id.*, at A63. Second, Herron was a member of the Policy Board of the Minneapolis Neighborhood Revitalization Program (NRP), an entity formed by the City of Minneapolis and other local government entities to provide funding for economic revitalization in Minneapolis. *Id.*, at A64. The NRP is wholly funded by the MCDA. *Ibid.*

The indictment alleged in three counts that Sabri offered to give Herron money in exchange for official favors. Count One alleged that Sabri offered $5,000 in exchange for Herron's help in obtaining regulatory approvals from the City of Minneapolis. *Id.*, at A64-A65. Count Two alleged that Sabri offered $10,000 in exchange for Herron's attendance at a meeting and his threat to use eminent domain powers against private business owners who were unwilling to sell property to Sabri for his proposed project. *Id.*, at A65-A66. Finally, Count Three alleged that Sabri offered to give a 10 percent commission to Herron for obtaining an $800,000 community economic development grant from the City of Minneapolis, the MCDA, and other entities. *Id.*, at A66

3. Before trial, Sabri moved to dismiss the indictment on the ground that 18 U.S.C. § 666(a)(2) exceeds Congress' limited powers under the Constitution. J.A. A4. The District Court granted Sabri's motion. J.A. A7. The statute, the court determined, "does not require the government to prove a connection between the offense conduct and the expenditure of federal funds . . . ." Pet. App. A53. Without that requirement, the court held that the statute "is an unconstitutional exercise of Congress's power under the Spending Clause." *Id.*, at A61.

On the Government's appeal, a divided panel of the Court of Appeals for the Eighth Circuit reversed and reinstated the indictment. Pet. App. A29. Although it reversed, the majority agreed that "§ 666 contains no requirement that the government prove some connection between the offense conduct and federal funds beyond the express statutory requirement found in § 666(b) which requires proof that the relevant organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period." *Id.*, at A4. The majority also agreed that § 666(a)(2) could not be sustained as an exercise of Congress' spending power, because it is "a general criminal statute which directly regulates the conduct of persons who are not parties to the funding 'contract.'" *Id.*, at A19. There was no authority, the majority found, "supporting the proposition that Congress, acting pursuant to its power to attach conditions to the receipt of federal funds, has the authority to directly regulate the conduct of third parties who are not actually the recipients of the federal funds." *Id.*, at A17-A18.

The majority nonetheless reversed the judgment of the District Court. Although the Government had expressly "disavowed reliance on the Necessary and

Proper Clause when the question first arose at oral argument," *id.*, at A36 (Bye, J., dissenting), the majority relied on that Clause, holding that § 666(a)(2) "is a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States." *Id.*, at A-28.

Judge Bye filed a dissenting opinion rejecting the majority's argument that § 666(a)(2) is justified under the Necessary and Proper Clause. Citing this Court's decisions in *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), and *Alden* v. *Maine*, 527 U.S. 706, 732 (1999), Judge Bye maintained that § 666(a)(2) is not a "proper" exercise of federal power because it does not "he[w] to constitutional principles of limited federal government and state sovereignty." Pet. App. A33. "The development and enforcement of sound ethical standards, and of political accountability to citizens for failing to do so, lies at the very heart of sovereignty," reasoned Judge Bye. *Id.*, at A35. Section 666(a)(2) "intrudes upon state and local concerns by federalizing anticorruption law," and it therefore "offends the Constitution's basic limitations on federal power." *Id.*, at A33.

SUMMARY OF ARGUMENT

I. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991). In this federalist system, only the States possess a general police power. Section 666(a)(2) of Title 18, however, imposes federal criminal liability on wholly local conduct that has no connection to any federal interest. The ruling below, by sustaining this claimed authority, threatens to erase the "distinction between what is truly national and what is truly local."

United States v. *Morrison*, 529 U.S. 598, 617-18 (2000). The Court should reverse, for it cannot affirm without abandoning the view that the Constitution places "judicially enforceable outer limits" on federal power. *United States* v. *Lopez*, 514 U.S. 549, 566 (1995).

A. Under the Constitutional imperative of a limited federal government, the Court has carefully identified the limits on Congress' power to "provide . . .for the general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. First, the General Welfare Clause does not grant the power to regulate, only to use federal money to persuade. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). Second, the power to place conditions on federal spending is further limited. *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The conditions must be reasonably related to the interest in the federal program. And the amount of the funds at stake must not be so great that their withholding would be equivalent to the exercise of a coercive, regulatory authority. Were it not for these limitations, the power to spend would become a general police power that would "render academic the Constitution's other grants and limits of federal authority." *New York* v. *United States*, 505 U.S. 144, 167 (1992).

B. On its face, § 666(a)(2) federalizes virtually the entire area of anti-corruption law. The statute imposes federal criminal liability for offering a bribe to influence any "agent of an organization or of a State, local or Indian tribal government" (§ 666(a)(2)) that receives "in excess of $10,000 under a Federal program" (§ 666(b)) in any continuous twelve month period surrounding the commission of the offense (§ 666(d)(5)). Within these statutory elements lie the employees of every State, of every major city and most minor ones,

and of most counties. The statute covers local police departments, the employees of hospitals and clinics, and the teachers in local schools. Moreover, because it applies to governments and organizations as a whole whenever any part of the entity receives at least $10,001 in federal funding, § 666(a)(2) imposes federal criminal liability on broad categories of wholly local conduct that involve no federal money and affect no federal program.

C. The plain language of § 666(a)(2) does not permit the judiciary to limit the statute's application to conduct that is connected to a federal interest. As the unanimous Court explained in *Salinas* v. *United States*, 522 U.S. 52, 56 (1997), the statute uses "expansive, unqualified language, both as to the bribes forbidden and the entities covered." Its text applies to "any" transaction of a sufficient value, § 666(a)(2), precluding an interpretation limiting the statute to transactions that are connected to a federal interest. The text likewise applies to all agents of "organizations" and "governments" that receive sufficient federal funding, § 666(a)(2), (b), precluding an interpretation limiting the statute to bribery involving agents who are connected to a federal program. Because the statute is unambiguous on these points, neither canons of construction nor legislative history can limit its reach.

D. Section 666(a)(2) is unconstitutional on its face because it exceeds Congress' limited authority under the spending power. First, the statute reaches beyond legitimate contractual authority to impose criminal liability on individuals who have not consented to receive any conditional federal spending. This clear violation of the limits on the spending power cannot be justified by the Federal Government's interest in protecting its own institutions, for the statute applies

indiscriminately to State and local governments. And "[s]tate governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 505 U.S., at 188. The sovereign interest in punishing corruption within state and local governments belongs to the States. The wrong done to the Federal Government is limited to "the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary . . . for the loss caused by that failure." *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002).

Section 666(a)(2) also facially violates the limits placed by *Dole* on conditional federal spending. First, the statute is unduly coercive, because it makes the entirety of a State's federal benefits turn on "consenting" to the condition. No state official could decline the billions of dollars in federal funding it would take to escape § 666(a)(2). Second, the statute is not sufficiently related to any federal interest. The Government contends that *all* corruption within state and local governments that receive federal funds affects a federal interest. But "[t]o uphold the Government's contentions . . . we would have to pile inference upon inference in a manner that would be fair to convert congressional authority . . . to a general police power of the sort retained by the States." *Lopez*, 514 U.S., at 567. Section 666(a)(2) is facially invalid because the conduct it covers does not uniformly have the requisite connection to a federal interest, and no statutory element requires the jury to find the necessary connection in each specific case.

E. The court below fundamentally misunderstood this Court's spending-power decisions when it held that § 666(a)(2) is necessary and proper to carry into execution the spending power even though it exceeds

the power itself. "The Court's broad construction of Congress' power under the . . . Spending Clause[ ] has of course been guided . . . by the Constitution's Necessary and Proper Clause." *New York*, 505 U.S., at 158-59. The limits identified in the Court's decisions are the outermost limits of Congress' combined power under both Clauses. Because § 666(a)(2) exceeds those limits, it is unconstitutional.

The Court should enforce the constitutional limits on federal power and hold that § 666(a)(2) is unconstitutional on its face.

ARGUMENT

I. Section 666(a)(2) of Title 18 Exceeds Congress' Limited Powers Under Article I of the Constitution.

"Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Section 666(a)(2) reaches directly into this sensitive area of State sovereignty to regulate wholly local conduct. The Government asserts that the statute is justified by Congress' power to spend money to "provide for the . . . general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. "The spending power," however, "is of course not unlimited but is instead subject to several general restrictions . . . ." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (citation omitted). And § 666(a)(2) exceeds those restrictions. The power it exercises is a general police power that the Constitution denies to the Federal Government. The Court should hold § 666(a)(2) unconstitutional on its face, because it cannot sustain the statute without

abandoning "judicially enforceable outer limits" on federal power. *United States* v. *Lopez*, 514 U.S. 549, 566 (1995).

A. The Spending Power Does Not Grant General Regulatory Power To The Federal Government.

To secure the people's liberties, the Framers created a federal system of two governments, state and federal—each accountable to the citizens, each protecting their liberty. "In th[is] tension between federal and state power lies the promise of liberty." *Gregory*, 501 U.S., at 459. To establish the federalist system, the Constitution enumerates a few fields over which Congress has complete regulatory power. And it lists one form of power—the spending power—by which Congress may act in any field. The very role of the spending power in the constitutional structure limits the authority it grants. It does not grant Congress the power to regulate directly. For if the power to spend is also the power to regulate, then Congress not only may reach every field, it may regulate every field. The one power will have become unlimited power. That is not the federal system that the Framers created, and it is not the limited power given Congress by the Constitution.

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S., at 457. To the Federal Government, the Constitution grants a few, enumerated powers. *See Lopez*, 514 U.S., at 552. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 176 (1803). "The powers not delegated to the United States by the Constitution, nor prohibited

by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. As James Madison explained, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961). This federalist system "was the unique contribution of the Framers to political science and political theory." *Lopez*, 514 U.S., at 575 (Kennedy, J., concurring).

Carefully and repeatedly, the Court has defined the limits on the spending power that keep it within the authority given to the Federal Government by the Constitution. First and foremost, the Court has explained that the spending power is not a regulatory power. Rather, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the "contract."'" *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst*, 451 U.S. at 17).

The difference between regulatory authority and contractual, spending authority is written in the constitutional structure, and it serves the Framers' ultimate purpose of limiting federal power for the protection of individual liberty. Where Congress is granted the power to regulate, that power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. (22

U.S.) 1, 196 (1824). Consequently, federal regulatory power is limited to a few, enumerated fields to preserve the limited role of the national government. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (power to "regulate commerce . . . among the several states"); *id.* at cl. 4 (power to "establish an uniform rule of naturalization"); *id.* at cls. 12-14 (power to "raise and support armies," "provide and maintain a navy," and "make rules for the government and regulation of the land and naval forces").

The spending power, in contrast, "is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936). It can potentially reach every field, because the only topical limitation on its reach is that the spending must "provide for the . . . general welfare of the United States," U.S. CONST. art. I, § 8, cl. 1, a limitation that the Court has confessed cannot readily be enforced by the judiciary, *Dole*, 483 U.S., at 207; *Helvering* v. *Davis*, 301 U.S. 619, 640-41 (1937); *United States* v. *Butler*, 297 U.S. 1, 65 (1936); *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976) *(per curiam)*.

Because the spending power can potentially reach every field, the Court has recognized that it cannot grant Congress the power to regulate. "[O]therwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *New York* v. *United States*, 505 U.S. 144, 167 (1992); *see also Davis* v. *Monroe County Bd. Of Educ.*, 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting) ("[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which

otherwise would lie outside its reach"); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003). A power to regulate for "the general Welfare" could not be reconciled with the constitutional design, because "[u]nder our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace." *United States* v. *Morrison*, 529 U.S. 598, 616 (2000).

Even within its proper role of placing conditions on government spending, "[t]he spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases." *Dole*, 483 U.S., at 207 (citation omitted). First, the "exercise of the spending power must be in pursuit of 'the general welfare.'" *Id.*, at 207 (quoting *Helvering* v. *Davis*, 301 U.S. 619, 640-41 (1937)). Second, the conditions that Congress imposes must be unambiguous so that the States may "'exercise their choice knowingly, cognizant of the consequences of their participation.'" *Dole*, 483 U.S., at 207 (quoting *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the conditions placed on the funding must be reasonably related to the interest in that program, and "if they are unrelated 'to the federal interest in particular national projects or programs,'" they may be "illegitimate." *Id.*, at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality opinion)); *see also Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958). Fourth, the conditions cannot violate "other constitutional provisions" that "provide an independent bar" on federal action. *Dole*, 483 U.S., at 208 (citing *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985)). Finally, "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at

which 'pressure turns into compulsion.'" *Dole*, 483 U.S., at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

2. The limits on the spending power, as on other federal powers, are informed by the purposes for which the limits were established. The purpose of the federalist system, and its primary benefit, is to serve as "a check on abuses of government power." *Gregory*, 501 U.S., at 458. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York*, 505 U.S., at 181 (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also Morrison*, 529 U.S., at 616 n. 7 ("[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power.").

Both power and political accountability for the criminal law belong primarily to the States, and altering that allocation threatens fundamental liberties. "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S., at 561 n. 3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (quotation marks omitted)); *see also Lopez*, 514 U.S., at 583 (Kennedy, J., concurring) (criminal law is "an area to which States lay claim by right of history and expertise"). Hence, "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S., at 561 n. 3 (quoting *United States* v. *Emmons*, 410 U.S. 396, 411-12 (1973)).

The consequences of allowing the Federal Government to exceed the limits on its authority to

enact criminal statutes are severe. "The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Lopez*, 514 U.S., at 576 (Kennedy, J., concurring). "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.*, at 577.

B. On Its Face, § 666(a)(2) Imposes Federal Criminal Liability On Nearly The Entire Body Of Local Government Corruption.

On its face, § 666(a)(2) federalizes virtually the entire area of local corruption, regardless whether the offense conduct has any connection to federal interests. The statute provides, in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists--
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> * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.
>
> * * *
>
> (d)(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

The elements of § 666(a)(2) allow the Government to prove a violation with conduct that does not affect any federal program or federal spending. The statute plainly states that the Government must prove only two, limited connections between a bribe and the expenditure of federal funds. First, the Government must prove that the bribe was intended to influence an agent of an organization or government that received more than $10,000 in federal benefits in any twelve-month period surrounding the bribe. §§ 666(a)(2), (b), (d)(5). Second, the Government must prove that the bribe was "in connection with any business, transaction, or series of transactions" of the organization or government "involving anything of value of $5,000 or more." § 666(a)(2).

Within the scope of these two "connections" lies a vast body of entirely local conduct. The $10,000

funding requirement places no meaningful limit on the governments and organizations covered by § 666. *Every* State receives far more than the requisite $10,000 in federal benefits. *See* Office of Management and Budget, U.S. Gov't, Executive Office of the President, Historical Tables, Budget of the U.S. Gov't, Fiscal Year 2000. Every major city and most minor ones, nearly every county, and most Indian tribes also receive the minimal amount of federal benefits required to fall within § 666. Pet. App. A-33 (Bye, J., dissenting) ("it is beyond dispute that . . . nearly every county, tribe and city . . . receives that sum in yearly federal benefits"); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, ___, 123 S.Ct. 1239, 1246 (2003) ("in 2003 local governments are commonly at the receiving end of all sorts of federal funding schemes"); George D. Brown, *The Stealth Statute–Corruption, The Spending Power and the Rise of § 666*, 73 NOTRE DAME L. REV. 247, 275 (1998). In addition, many police departments independently receive sufficient federal funding. *See United States* v. *McCormack*, 31 F. Supp. 2d 176, 178 (D. Mass. 1998). And not just governments fall within § 666, but organizations as well. Because Medicare reimbursements qualify as federal "benefits," (*Fischer* v. *United States*, 529 U.S. 667, 681 (2000)), it is almost inconceivable that any hospital or clinic falls outside § 666. Local schools also receive federal benefits, *see, e.g., Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (applying Title IX to school because it received "roughly $120,000" in federal funding), so offering bribes to principals, teachers, and school board members may now qualify as a federal criminal offense. Pet. App. A-34 (Bye, J., dissenting) ("It is now a federal crime for an auto mechanic to induce a public high school principal to hire him to teach shop class by offering free car repair."). The examples of covered governments and

organizations can be multiplied as far as federal benefits extend—and with federal domestic spending reaching 1.9 trillion dollars in 2002, federal benefits extend virtually everywhere. *See* U.S. Census Bureau, Summary of Federal Government Expenditure by State and Outlying Area: Fiscal Year 2002.

As vast as federal spending is, § 666(a)(2) is broader still, because it applies to governments and organizations as a whole. Whenever any segment of a government receives the requisite federal funding, all of the government's agents fall within the statute. Section 666(a)(2) thus criminalizes wholly local conduct. In *United States* v. *Grossi*, 143 F.3d 348, 350 (CA7 1998), for example, the court applied § 666 to bribes given by a local chiropractor to a township supervisor for disbursements from the township's general assistance program, even though that program was "funded entirely by local sources." In *United States* v. *Lipscomb*, 299 F.3d 303, 332-34 (CA5 2002), the court applied § 666 to bribery of a Dallas city council official involving taxi services, even though the city received no federal funding relevant to that field. Moreover, the statute could be applied more broadly yet. For example, the statute would allow the Government "to prosecute a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000." *United States* v. *Santopietro*, 166 F.3d 88, 93 (CA2 1999) (interpreting § 666 to require the Government to prove a nexus between federal interests and the corruption to avoid this absurd result).

C. The Plain Language Of § 666(a)(2) Cannot Be Judicially Limited To Apply Only To Conduct That Implicates A Federal Interest.

Section 666(a)(2) cannot be interpreted to contain any "nexus" element that would limit the statute to conduct that affects federal programs or federal spending. In *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court held that § 666 does not require the Government to prove either that "federal funds were involved in the bribery transaction" or that "the bribe in question had any particular influence on federal funds." 522 U.S., at 60. The Court reserved the question "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." *Id.*, at 59. But the answer to that question follows directly from the text of the statute.

Section 666 plainly states the two connections the Government must prove between a bribe and the expenditure of federal funds, and there is no ambiguity in the statute that would allow the judiciary to require the Government to prove any other connection.[1] First, the Government must prove that the bribe was intended to influence an agent of an organization or government that received more than $10,000 in federal benefits in any twelve-month period surrounding the bribe. §§ 666(a)(2), (b), (d)(5). Second, the Government must prove that the bribe was "in connection with any business, transaction, or series of transactions" of the

[1] This interpretation is supported by the greater weight of the authority in the lower federal courts. *See United States* v. *Sabri*, 326 F.3d 937 (CA8 2003); *United States* v. *Edgar*, 304 F.3d 1320, 1327 (CA11 2002); *United States* v. *Lipscomb*, 299 F.3d 303 (CA5 2002); *United States* v. *Suarez*, 263 F.3d 468, 489-90 (CA6 2001); *United States* v. *Grossi*, 143 F.3d 348 (CA7 1998); *United States* v. *McCormack*, 31 F.Supp.2d 176, 186 (D. Mass. 1998).

organization or government "involving anything of value of $5,000 or more." § 666(a)(2).

As the unanimous Court explained in *Salinas*, § 666 uses "expansive, unqualified language, both as to the bribes forbidden and the entities covered." 522 U.S., at 56. With regard to the entities covered, the statute applies to every "organization, government, or agency" that "receives, in any one year period, benefits in excess of $10,000 under a Federal program." § 666(b); *see also Fischer* v. *United States*, 529 U.S. 667 (2000) (defining "benefits"). Other federal spending statutes have limited their conditions to the "program or activity" that receives the federal funding. *See, e.g., Grove City College* v. *Bell*, 465 U.S. 555 (1984) (interpreting Title IX of the Education Amendments of 1972). But § 666 does not. It refers, not to programs, but to governments, organizations, and agencies. "The difference is palpable." *United States* v. *Grossi*, 143 F.3d 348, 350 (CA7 1998) (Easterbrook, J.). Moreover, the structure of § 666 attests that Congress' choice to extend § 666 beyond federal programs was deliberate, because the statute uses the term "program" in another provision but omits it from § 666(a). *Compare* § 666(b) (requiring the $10,000 in benefits to flow from a "Federal *program*") (emphasis added). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

The Third Circuit relied on the title of § 666, "Theft or bribery concerning programs receiving Federal funds," to conclude that the statute's text is ambiguous. *United States* v. *Zwick*, 199 F.3d 672, 682 (1999). But a

title cannot create ambiguity. Its "interpretive role" is "only [to] shed light on some ambiguous word or phrase in the statute itself." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (quotation marks omitted). And § 666 is unambiguous on this point. Organizations qualify for coverage under § 666 as organizations, governments qualify as governments, and agencies as agencies. There is no textual basis for limiting § 666 to bribes connected to federally-funded programs.

Nor is there any textual basis for requiring that the transaction implicated by the bribe be connected to the federal funding that the organization receives. The statute forbids the offering of bribes "in connection with *any* business, transaction, or series of transaction of [a covered] organization . . . involving anything of value of $5,000 or more." § 666(a)(2) (emphasis added). As *Salinas* noted, "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose [a] narrowing construction" on the statute. 522 U.S., at 57. Transactions that do not affect federal funds or federally-funded programs fall within § 666 just as plainly as those that do.

Because the breadth of § 666 is "plain to anyone reading the Act," the judiciary cannot press a limiting construction on the statute either to protect it against constitutional challenge or to preserve the balance of federal power. *Gregory* v. *Ashcroft*, 501 U.S. 452, 467 (1991). The canon of interpreting a statute to avoid constitutional question "'has no application in the absence of statutory ambiguity.'" *HUD* v. *Rucker*, 535 U.S. 125, 134 (2002) (quoting *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001)). As the Court repeated in *Salinas*, "'No rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct

clearly intended to be within its scope . . . .'" 522 U.S., at 59 (quoting *United States* v. *Raynor*, 302 U.S. 540, 552 (1938)). To require the Government to prove some nexus between the offense conduct and federal interest—either by linking the conduct to a federal program, or by linking the transaction to federal spending—would "press statutory construction to the point of disingenuous evasion." *Salinas*, 522 U.S., at 60 (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 57 n. 9 (1996)). That is something the Court may not do "even to avoid a constitutional question." *Ibid.*

The legislative history of the statute likewise provides no basis for limiting its plain text. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). Even if the Court were to examine the history of § 666, it does not provide the "rare and exceptional circumstances" that would justify deviating from the statute's plain language. *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991); *see also Salinas*, 522 U.S., at 57 ("'"[O]nly the most extraordinary showing of contrary intentions" in the legislative history will justify a departure from that language.'") (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)). The "chronology and the statutory language" of § 666 demonstrate that it "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by *agencies* receiving federal funds." *Salinas*, 522 U.S., at 58-59 (emphasis added). And although the legislative history supports the inference that federally-funded programs are one object of the statute, it provides no evidence that they are the exclusive object. S. Rep. No. 225, 98th Cong., 1st Sess. 369-70, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11. This is not sufficient to prune the plain language of § 666. "[I]t is not, and cannot be, our practice to

restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998).

Section 666 does not require the Government to prove any connection between a bribe and federal funds beyond the two set forth in the statute. It applies indiscriminately to wholly local conduct.

D. Section 666(a)(2) Is Facially Unconstitutional, Because The Spending Power Does Not Permit Congress To Impose Criminal Liability On Individuals Who Receive No Federal Funds, And On Conduct That Affects No Federal Interest.

Congress, in enacting § 666, did not appeal to any of its enumerated regulatory powers. It invoked instead its power to spend money to "provide for the . . . general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1; *see also Fischer* v. *United States*, 529 U.S. 667, 689 n. 3 (2000) (Thomas, J., dissenting) ("Section 666 was adopted pursuant to Congress' spending power"). Section 666(a)(2) exceeds Congress' limited power under the Spending Clause because it imposes federal criminal liability on third parties who have no ability to reject the federal funding that triggers the statute's coverage. It thus cannot be justified as a consensual obligation incurred upon the conditional receipt of federal spending. Section 666(a)(2) also fails the *Dole* test for appropriate conditions on federal spending. It imposes criminal liability on conduct entirely unrelated to federal spending, thus betraying it as a regulation rather than a valid condition. In addition, the statute is unduly coercive because to escape it, a State must

renounce all of its federal funding, saving only $10,000 per year.

1. Section 666 violates the most fundamental limitation on the limits of the spending power by exercising criminal regulatory authority over individuals who have not consented to receive any conditional federal funding.

Section 666(a)(2) does not place contractual restrictions on recipients of federal funding, it imposes direct, criminal liability on individual citizens. The statute's coverage is triggered by extending federal benefits to "organization[s], government[s], or agenc[ies]." § 666(b). But it places no conditions on those entities. Indeed, it does not place a "condition" on federal money at all. *Cf. Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 23 (1981) ("If funds cannot be terminated for a State's failure to comply with [the provision, it] can hardly be considered a 'condition' of the grant of federal funds."); compare *City of Columbus* v. *Ours Garage & Wrecker Serv.*, 536 U.S. 424, 438 (2002) (listing example of traditional condition statutes where receipt of funds is conditioned on complying with regulations); *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278-79 (2002) (Family Educational Rights and Privacy Act of 1974, which conditioned funds on complying with provisions). The statute instead imposes direct criminal liability, and the liability falls, not on the recipients of the federal funding, but on individuals. "Whoever . . . corruptly gives, offers, or agrees to give" a bribe is liable for a federal offense. § 666(a)(2).

Section 666(a)(2) exceeds the most fundamental limitation on the spending power. It is no answer to the constitutional defect of § 666 to say that the States and local governments who received federal funding

consented to its terms. The agreement of two parties cannot impose obligations on a third party. *Firefighters* v. *Cleveland*, 478 U.S. 501, 529-30 (1986) ("[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree."). Neither may the States and local governments agree with the Federal Government to impose criminal liability on individuals.

Indeed, the Constitution itself precludes States and local governments from "contracting" away the liberties of their citizens and allowing Congress to exceed its proper role in the federal structure. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York*, 505 U.S., at 181. Thus, "[w]here Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York*, 505 U.S., at 182.

2. Section 666(a)(2) also cannot be justified by the Federal Government's interest in protecting its own institutions from corruption, because the statute applies only to State and local institutions. It is the States' interest in integrity that is affected by the local corruption that § 666(a)(2) regulates. The sovereign authority to sanction that conduct is theirs as well. The limited interest of the Federal Government in money it has already spent is to ensure that the money is properly applied, and the Court has already identified the conditional means by which the Government can protect that interest.

Petitioner does not challenge the authority of the Federal Government to protect its own institutions from corruption. Numerous statutes, both civil and criminal, directly protect the Government's interest in preserving its own institutions and property. *See, e.g.*, 18 U.S.C. § 201 (criminalizing corruption involving a "Member of Congress, Delegate, or Resident Commissioner . . . or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof"); 18 U.S.C. § 287 (criminalizing false claims made "to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof"); 18 U.S.C. § 641 (providing that "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof" is guilty of a federal crime); 18 U.S.C. § 1001 (making it a federal crime to give a false statement "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States"); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, ___, 123 S.Ct. 1239 (2003) (interpreting the False Claims Act, 31 U.S.C. § 3729, which applies, *inter alia*, to any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," § 3729(a)(3)). Holding that § 666(a)(2) exceeds Congress' authority under the spending power will leave the Government's protections of its own institutions intact.[2]

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[2] The Court need not address here the constitutionality of 18 U.S.C. § 201, as interpreted in *Dixson* v. *United States*, 465 U.S. 482, 496 (1984), to apply to State and local officials who

That a sovereign may protect its own institutions is import of the Court's dictum in *Salinas* that § 666 was constitutional as applied to behavior that threatened the integrity of the federal prison programs. 522 U.S., at 60-61. The question before the Court was whether to apply the canon of interpreting a statute to avoid a constitutional question. *Id.*, at 54, 60. The Court answered that the text of § 666 was "unambiguous on the point under consideration," and therefore held that the canon could not be applied. *Id.*, at 60. That was sufficient to resolve the issue presented, but the Court also added that the application of the statute was constitutionally justified because the bribery in question had involved a federal prisoner and had threatened "the integrity and proper operation of the federal program." *Id.*, at 61. In support, the Court cited *Westfall* v. *United States*, 274 U.S. 256 (1927), which held that the Federal Government could impose criminal liability for acts that impaired "instrumentalities of the United States," such as the banks at issue there that were members of the federal reserve system. *Id.*, at 259.

The Government's legitimate interest in preserving federal institutions from corruption, however, cannot justify § 666(a)(2) on its face, because the statute is not limited to federal "instrumentalities." It applies instead to State and local governments, and it punishes local corruption that has no effect on any federal program. *Westfall*'s rationale has no application here, because the States are not mere federal

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"occup[y] a position of public trust with official federal responsibility[y]." Sabri was not indicted under § 201, and even *Dixson*'s expansive interpretation of that statute requires the Government to prove what § 666 does not—that the offense conduct affects the integrity of a federal program.

"instrumentalities." As the Court has explained, States "are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 505 U.S., at 188; *see also Dixson* v. *United States*, 465 U.S. 482, 510 (1984) (O'Connor, J., dissenting) (especially when federal spending takes the form of block grants, there is "a strong presumption that state and local governments are carrying out their own policies and are acting on their own behalf, not on behalf of the United States, even when their programs are being funded by the United States"). The States are independent sovereigns, and it is their integrity—not the Federal Governments'—that is threatened by the local corruption that § 666(a)(2) claims to cover. It is for the States to vindicate their sovereignty and punish the threat against it. Every State has an anti-bribery statute for precisely that purpose, *Dixson*, 465 U.S., at 511 n. * (O'Connor, J., dissenting); 12 Am. Jur. 2d Bribery § 4 (May 2003), including Minnesota, Minn. Stat. § 609.42 (2002).

The federal interest in money that the Government has already spent is not the interest of a sovereign in protecting itself against corruption. Rather, as the Court has explained, it is the limited interest of a contracting party in ensuring that the terms of the deal are carried through—and the permissible remedies are commensurate to that interest. "When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure." *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002). The

Court has therefore held that Congress can enforce the limitations on federal spending by recovering from the States money that had been misspent. *Bennett* v. *Kentucky Dept. of Ed.*, 470 U.S. 656 (1985) (enforcing action by Secretary of Education to retake funds that State had misspent); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 603 n. 24 (1983) (opinion of White, J.) (citing *Bell* v. *New Jersey*, 461 U.S. 773 (1983) (White, J., concurring). And, Congress may authorize actions by the intended beneficiaries of the federal spending to recover the lost benefits or be compensated for injuries caused by the recipients' violation of the agreed-upon terms. *See, e.g., Davis Next Friend LaShonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

It would perhaps be expedient for the Federal Government to have direct criminal authority under the spending power. But the Constitution "divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S., at 187. If an enumerated regulatory power reaches State and local corruption, Congress may of course exercise it. Indeed, in response to the Court's decision in *McNally v. United States*, 483 U.S. 350, 355 (1987), Congress amended the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to apply to "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346; *see Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000) (statute amended in response to *McNally*). The Court has never held, however, that Congress may pass criminal statutes under the authority of the spending power, and it cannot sustain § 666(a)(2) without

abandoning the fundamental limit on the General Welfare Clause that prevents that Clause from overrunning all enumerated limits on federal authority.

3. Even if it exercised only contractual, spending power authority, § 666(a)(2) would still be facially unconstitutional, because it exceeds the two primary restrictions on that power announced in the Court's decision in *South Dakota* v. *Dole*. First, the statute is unduly coercive, because it makes the entirety of a State's federal benefits turn on "consenting" to federal criminal jurisdiction. The financial inducement in *Dole* was inconsequential by comparison to the benefits at stake under § 666. There, a State declining to accept the condition would lose only "5% of the funds otherwise obtainable under specified highway grant programs." 483 U.S., at 211. Under § 666, a State must decline 100% of its federal benefits (save for $10,000), not 5%, and for every federal program, not just a handful. No State could turn down all of its federal benefits in this fashion. In 1999, Minnesota state and local governments would have been required to surrender $4.496 billion in federal aid to resist federal regulation of local corruption. *See* Bureau of the Census, U.S. Dep't of Commerce, State and Local Governments--Revenue by State for Fiscal Year 1999. California governments would have had to surrender $35.955 billion; Arizona governments, $3.952 billion. *Ibid.* North Dakota's surrender, at $1.018 billion, ranks near the bottom in total dollars—but that sum comprised 25% of North Dakota's total state budget for the year. *Id.* If there is to be any limit on the coerciveness of the financial inducement that Congress may impose, then placing the entirety of a State's federal benefits at issue must fail it. Section 666 is unduly coercive, or no statute is.

Second, § 666 also fails the requirement that the "condition" must be related to the purpose of the federal program. This case, like *Dole*, does not require the Court to "define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power," 483 U.S., at 209 n. 3—but for the opposite reason. In *Dole*, the condition fell within the limitation, wherever it might ultimately be drawn. Here, § 666 falls outside it, because it imposes criminal liability on conduct that has no effect on any federal program or any federal spending. A federal grant to any single program of a State government qualifies the government as a whole for coverage under § 666. *See supra*, at 19. For example, § 666 would apply to a bribe offered on December 31 to an agent of the city parks department, even if the only federal benefits the city received were on the preceding January 1 for its highway program. This is not a "reasonable condition[ ] relevant to federal interest in the project and to the over-all objectives thereof." *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958). The relatedness requirement is intended to ensure that "the Spending Clause [is] not simply a device to obtain federal jurisdiction," *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 291 (2002) (Breyer, J., concurring in the judgment). Here, the federal spending serves only that purpose.

The Government contends that the Court may uphold § 666 because corruption anywhere within a State government affects the integrity of that government and hence the integrity of the specific federally-funded programs. This is "a view of causation that would obliterate the distinction between what is national and what is local . . . ." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring). And it is a view the Court

has rejected. *Lopez*, 514 U.S., at 566-67; *Morrison*, 529 U.S., at 616 n. 6 ("We are not the first to recognize that the but-for causal chain must have its limits . . . ."). The Government's argument here, analogous to the argument it made in *Lopez* and *Morrison*, is that the Court may determine that *every* act of attempted bribery involving a transaction of at least $5,000 and an agent of an entity receiving more than $10,000 in federal funding sufficiently affects federal interests within the Spending Clause. *Cf. Lopez*, 514 U.S., at 563 ("The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce.") And as in *Lopez*, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under [one enumerated clause] to a general police power of the sort retained by the States." *Id.*, at 567. To uphold § 666 would require the Court "to conclude . . . that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do." *Id.*, at 567-68 (citation omitted).

Section 666 is facially invalid because the conduct it covers does not uniformly have the requisite connection to federal spending, and no element within the offense requires the jury to find the necessary connection in each specific case. When a statute has reached beyond Congress' authority, the Court, "[i]n various settings, [has] interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope." *Ring* v. *Arizona*, 536 U.S. 584, 606 (2002) (citing *Lopez*, 514 U.S., at 561-62; *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) *(per curiam)*; *Lambert* v. *California*, 355

U.S. 225, 229 (1957)). The Court in *Lopez*, for example, did not doubt that within the possessions of firearms covered by § 922(q) there was some "discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. Yet because the statute did not require the jury to find that connection or effect, the Court held the statute facially unconstitutional. The Court in *Morrison* also acknowledged subcategories of gender-motivated violence that were "directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce." 529 U.S., at 609, 613 n. 5. Yet because Congress did not require the plaintiff to prove those connections as an element of the crime and "elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime," *id.*, at 613, the Court "agree[d] that . . . the proper inquiry" was whether "gender-motivated violence wherever it occurs" had a substantial effect on interstate commerce. *Id.*, at 609. Finding that it did not, the Court struck the statute down on its face. *Id.*, at 617.

In the analogous context of a facial challenge to agency regulations, Justice Scalia has explained why a law cannot be justified by the fact that it has been drafted so broadly as to encompass some conduct that the regulator could lawfully regulate:

> It is one thing to say that a facial challenge to a regulation that omits statutory element x must be rejected if there is any set of facts on which the statute does not require x. It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of

> facts in which element x happens to be present. On this analysis, the only regulation susceptible to facial attack is one that not only is invalid in all its applications, but also does not sweep up any person who could have been held liable under a proper application of the statute. That is not the law.

Babbitt v. *Sweet Home Chapter of Comty. for a Great Ore.*, 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting). The same analysis is true of facial constitutional challenges to a statute. It would be one thing to say that a facial challenge to a spending power statute should fail if there were situations in which the General Welfare Clause did not require the statute to be related to the federal interest in its spending program. It is altogether different—and simply incorrect—to say that a challenge should fail simply because the statute is so broad that it covers some conduct that Congress could regulate. Section 666(a)(2) sweeps in local corruption generally, and no element requires the jury to find the requisite federal connection. The statute is defective on its face, because it never requires the jury to find an element that the Constitution always requires.

"The Constitution requires a distinction between what is truly national and what is truly local," *Morrison*, 529 U.S., at 617-18, and the Court has "'*always* . . . rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power.'" *Id.*, at 618-19 (quoting *Lopez*, 514 U.S., at 584-85 (Thomas, J., concurring). Section 666(a)(2) is an exercise of a police power that Congress was not given.

4. The consequences of § 666(a)(2)'s unauthorized expansion of federal power are severe, because the

statute eliminates the ability of citizens to hold a single sovereign accountable for the failures and excesses in local criminal enforcement.

Perhaps more than any other type of federal regulation, federal criminal statutes blur local and federal political accountability. As a general rule, they do not preempt state criminal regulations. *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); Pet. App. A35 (Bye, J., dissenting) ("I recognize, of course, § 666(a)(2) does not preempt state or local power to punish corruption."). Hence, they do not leave any single sovereign accountable for exercising authority. Both sovereigns *can* act, but neither is *required* to act. Each government can blame any failure on the other, leaving neither the State nor the Federal Government accountable to the people. When the Government interposes federal criminal regulation in an "area[ ] of traditional state concern," it therefore blurs "the boundaries between the spheres of federal and state authority" and makes "political responsibility . . . illusory." *Lopez*, 514 U.S., at 577 (Kennedy, J., concurring).

Moreover, when federal criminal regulation is tied to federal spending, "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests." *New York*, 505 U.S., at 182. On the one hand, because the federal criminal regulation will not require the States to relinquish their own regulatory authority, they have little to lose in "consenting" to the federal infringement. And on the other hand, States have a significant amount to gain by accepting. By accepting,

the States continue to receive and control the disbursement of federal funding, from which they garner significant political benefits. Paradoxically, the political protection of individual liberty is thus weakest precisely where the threat to that liberty—from direct criminal sanctions—is greatest.

Even more clearly than the gun-control statute at issue in *Lopez*, section 666(a)(2) "upsets the federal balance to a degree that renders it an unconstitutional assertion" of federal power. *Id.*, at 580 (Kennedy, J., concurring). To deny the federal incursion, States and local governments would be required to renounce all federal funding save for an insignificant $10,000. In every State, this would amount to billions of dollars. *See supra*, at 19, 31. The deal that § 666(a)(2) offers is thus a dismayingly easy one for the States to accept. At a gain of billions of dollars in federal largesse that they can distribute to political advantage, the States consent to concurrent federal criminal regulation, while retaining their own criminal anti-corruption statutes. The only loss is to the citizens, who lose the ability to hold a single sovereign—and a local one—accountable for both failures and excesses in enforcement against local corruption. Congress does not possess the authority to enact such a sweeping federal, criminal law, and § 666(a)(2) therefore violates the Tenth Amendment. *See New York*, 505 U.S., at 156.

E. The Necessary and Proper Clause Does Not Provide The Authority That Congress Lacks Under The Spending Power To Enact § 666(a)(2).

Although the Government "disavowed reliance on the Necessary and Proper Clause," Pet. App. A36, the court below rested its decision sustaining § 666(a)(2) wholly on that Clause. Invoking "the last, best hope of

those who defend ultra vires congressional action," *Printz* v. *United States*, 521 U.S. 898, 923 (1997), the court held that although § 666(a)(2) exceeds Congress' authority under the Spending Clause, it falls within Congress' power "to make all laws which shall be necessary and proper for carrying into execution" the spending power, U.S. CONST. art. I, § 8, cl. 18.

The Eighth Circuit's holding rests on a fundamental misunderstanding of this Court's decisions addressing the Spending Clause. The whole object of those decisions has been to discern which laws are necessary and proper for implementing the spending power. The distinction that the court of appeals drew between a spending power analysis and a necessary and proper analysis of a statute enacted under the spending power is wholly of its own making, and wholly artificial. Section 666(a)(2) is not a proper law for carrying into execution the spending power because it exceeds the constitutional limits on that power.

1. An analysis under the Necessary and Proper Clause is not foreign to the Court's decisions implementing the spending power, but an integral part of them. The Court has long recognized that the Necessary and Proper Clause applies to the spending power. *Buckley* v. *Valeo*, 424 U.S. 1, 90 (1976) *(per curiam)*. Both implicitly and explicitly, the Court has incorporated an analysis under that Clause into its decisions setting the limits on federal authority under the Spending Clause. When the Court catalogued the restrictions on the spending power in *Dole*, it implicitly acknowledged the role of the Necessary and Proper Clause. The Court analyzed whether "the means [Congress] chose" in the statute at issue "were reasonably calculated to advance the general welfare" and thus implement the spending power. 483 U.S., at 208. In *New York*, the Court made express what had

been implicit in *Dole*: "The Court's broad construction of Congress' power under the . . . Spending Clause[ ] has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause." 505 U.S., at 158-59 (citing *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 411-21 (1819)). The restrictions announced in the Court's spending power cases thus state the outermost limit of Congress' authority.

Those restrictions, moreover, follow directly from the classic statement of Chief Justice Marshall regarding the scope of the Necessary and Proper Clause. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 4 Wheat., at 421 (1819). As applied to enumerated powers that designate permissible federal fields of regulation without limiting Congress' means for addressing them, *McCulloch* alone sufficiently describes the appropriate scope of federal power. But in the General Welfare Clause, the Constitution defines, not just the permissible ends, but also the permissible means of federal power. Hence, only the means that the Clause allows "consist with the letter and spirit of the constitution," and only those means are "appropriate." *Ibid.*; *see* David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 5-24 (1994). If the spending power were not so limited, of course, it "could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S., at 167.

The Court's decisions identify the outermost limits of the spending power as implemented through the Necessary and Proper Clause. Section 666(a)(2)

exceeds those limits. *See supra* at 24-37. It is therefore an unconstitutional exercise of federal power.

2. In addition, the sovereignty of the States places an independent limit on Congress' authority under the Necessary and Proper Clause. *Alden* v. *Maine*, 527 U.S. 706, 732 (1999) (the Necessary and Proper Clause does not give Congress the authority to override a State's sovereign immunity to suit in its own courts). In *Printz*, the dissent contended that the Necessary and Proper Clause, in conjunction with the Commerce Clause, gave Congress the power to compel state officials to implement provisions of the federal Brady Act. 521 U.S., at 941. But the Court rejected that position, holding that laws that infringe state sovereignty are not "proper" for carrying into execution an enumerated power. *Id.*, at 923-24. "When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'Law . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'" *Printz*, 521 U.S., at 923-24 (quoting The Federalist No. 33, at 204 (A. Hamilton)).

Section 666(a)(2) interjects federal regulation into an area of traditional state authority, *see United States* v. *Bass*, 404 U.S. 336, 349 (1971), blurring the political accountability of both state and federal officials, and upsetting the federal balance to a degree that renders it unconstitutional. *See supra* at 11-16. The Court should enforce the constitutional limits on federal power and hold that § 666(a)(2) is unconstitutional on its face.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the Eighth Circuit Court of Appeals and hold that 18 U.S.C. § 666(a)(2) is unconstitutional on its face.

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In the Supreme Court of the United States

BASIM OMAR SABRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to the dismissal of the indictment charging him with bribing an agent of local government bodies that receive federal benefits, in violation of 18 U.S.C. 666(a)(2), (b), on the ground that the statute does not require a sufficient nexus to a federal interest and is, as a result, facially unconstitutional.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 326 F.3d 937. The opinion of the district court (J.A. A7-A40) is reported at 183 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2003. The petition for a writ of certiorari was filed on July 2, 2003, and was granted on October 14, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and 18 U.S.C. 666 are reproduced *infra*, App. 1a-3a.

STATEMENT

Petitioner was indicted on three counts of bribing an agent of an entity receiving federal benefits, in violation of 18 U.S.C. 666(a)(2), (b). Pet. App. A63-A66. Before trial, the United States District Court for the District of Minnesota dismissed the indictment on the ground that Section 666 is unconstitutional on its face. J.A. A7-A40. The court of appeals reversed. Pet. App. A1-A36.

1. *The Statutory Background*

Entitled "Theft or bribery concerning programs receiving Federal funds," 18 U.S.C. 666 makes it unlawful corruptly to offer, give, or agree to give anything of value "with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more," 18 U.S.C. 666(a)(2), if the "circumstance" set forth in Section 666(b) exists. The circumstance required by Section 666(b) is that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). Section 666 defines the term "government agency" as "a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau," as well as certain government corporations. 18 U.S.C. 666(d)(2).

Section 666 was enacted in 1984 to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by

bribery." See S. Rep. No. 225, 98th Cong., 1st Sess. 370 (1983). Before Section 666's enactment, the United States had sought to protect its funds and programs through the federal theft statute, which makes it unlawful to steal money or things of value "of the United States or of any department or agency thereof," 18 U.S.C. 641, and the federal bribery statute, which prohibits corrupt efforts to influence public officials acting for or on behalf of the United States, 18 U.S.C. 201. Those statutes, however, had proved inadequate for federal programs administered by private organizations, States, local governments, and their agencies, including many federally funded programs of "cooperative federalism" administered by States or local governments to achieve federal goals.[1]

Prosecuting theft under 18 U.S.C. 641 had often proved impossible because that statute required proof that the defendant misappropriated funds "of the United States." Under many federal programs, title to the money or property would often "pass[] to the recipient before" being "stolen, or the funds [would be] so commingled that the Federal character of the funds cannot be shown." S. Rep. No. 225, *supra*, at 369. That gave "rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Gov-

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[1] "Federal grant programs to state and local governments as well as to private organizations have been in existence since the 19th century." See *Dixson* v. *United States*, 465 U.S. 482, 506 (1984) (O'Connor, J., dissenting). Currently, the United States and the States work together to administer numerous such programs, which range from Medicaid, see 42 U.S.C. 1396 *et seq.*, which provides medical services to eligible needy persons, see *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 495 (2002), to programs that finance massive public works projects spanning numerous States, see *California* v. *United States*, 438 U.S. 645, 650 (1978) (discussing the Reclamation Act of 1902).

ernment clearly retain[ed] a strong interest in assuring the integrity of such program funds." *Ibid.* Similarly, bribery prosecutions under 18 U.S.C. 201 proved difficult because that provision applied only to "public official[s]." There was "some doubt as to whether or under what circumstances persons not employed by the Federal Government [could] be considered as a 'public official' under the definition in 18 U.S.C. 201(a)." S. Rep. No. 225, *supra*, at 370; see *Salinas* v. *United States*, 522 U.S. 52, 58 (1997) (noting the circuit conflict on that issue that existed before Section 666's enactment).[2] The varying mechanisms for disbursing and accounting for federal funds created gaps in coverage as well. See *Salinas*, 522 U.S. at 58-59 (describing the impact of *United States* v. *Del Toro*, 513 F.2d 656, 661-662 (2d Cir.), cert. denied, 423 U.S. 826 (1975)); S. Rep. No. 225, *supra*, at 369.

Section 666 sought to fill those gaps so as to restore the United States' "ability * * * to vindicate significant acts of theft, fraud, and bribery" that might threaten "Federal monies * * * disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 225, *supra*, at 369. To that end, Section 666 "does not require the Government to prove [that] federal funds were involved in the bribery transaction" or that "the bribe in question had any particular influence on federal funds." *Salinas*, 522 U.S. at 60, 61. Instead, Congress shifted the focus to proscribe the corruption of those private and public organizations that receive and administer substantial

[2] Shortly after Section 666's enactment, this Court resolved that conflict in *Dixson*, holding that local officials administering federal programs could be "public officials" within the meaning of Section 201. 465 U.S. at 497, 501.

federal funds (more than $10,000 per year) under federal programs. See 18 U.S.C. 666(b).

2. *The Present Controversy*

a. At all relevant times, petitioner was a real estate developer and landlord doing business in the City of Minneapolis, Minnesota (the City). Pet. App. A64. In 2000 and 2001, petitioner was pursuing a large commercial real estate development project involving a proposed hotel and accompanying commercial retail concerns. The indictment charges that petitioner offered to and did bribe City Councilperson Brian Herron of the Minneapolis City Council to obtain favorable government action for the project. At the time, Mr. Herron represented the Eighth Ward, which included the area for which petitioner had planned his real estate development. *Ibid.* Mr. Herron was also on the City Council's Ways and Means/Budget Committee. *Ibid.* During the calendar year beginning January 1, 2001, the City received, and the City Council administered, approximately $28.8 million in federal assistance. *Id.* at A63.

As a member of the City Council, Herron also served on the Board of Commissioners for the Minneapolis Community Development Agency (MCDA). Pet. App. A64. The MCDA was created by the City Council to fund housing and economic redevelopment projects and activities within the City. *Id.* at A63. The MCDA also had an executive director appointed by the mayor. *Ibid.* The MCDA and its programs were funded in part by federal assistance, including federal Community Development Block Grants. *Ibid.* In the calendar year beginning January 1, 2001, the MCDA received approximately $23 million in such federal assistance. *Ibid.*

Councilman Herron, together with the mayor and the other members of the City Council, were members of

the policy board that managed the Minneapolis Neighborhood Revitalization Program (MNRP). Pet. App. A64. Formed by the City and other local government entities to fund the economic revitalization of City neighborhoods, the MNRP was wholly funded by the MCDA. *Id.* at A63-A64.

Count 1 of the indictment alleged that petitioner gave Herron $5000 for Herron's assistance in obtaining necessary regulatory approvals from the City. Count 2 alleged that petitioner offered Herron $10,000 to meet with the owners of property in the area of the planned development and to threaten that, absent cooperation with the development plan, the MCDA might exercise its eminent domain power to condemn their property. Count 3 alleged that petitioner offered to give Herron $80,000 as a 10% kickback in return for his assistance in obtaining $800,000 in federal community economic development grants for the real estate project through the City, the MCDA, and other entities. Pet. App. A64-A66.

The government's evidence includes conversations between petitioner and Herron that had been recorded on a hidden video camera. See Gov't Trial Br. 3-11 (C.A. App. 41-49). In those conversations, petitioner offered Herron a secret investment interest in the development equal to sixty or seventy percent of any "free" government money Herron obtained for the project. *Id.* at 4, 5 (C.A. App. 42, 43). Petitioner later changed his offer to a kickback of "ten percent . . . of what [he] get[s]" in "free money." *Id.* at 7 (C.A. App. 45); see also *id.* at 8 ("Five when you say yes, I agree to the deal," and "then ten percent" of "whatever free money I get").

In those discussions, petitioner asked Herron to help him obtain federal "Empowerment Zone" funds administered by a Minneapolis city employee. Gov't Trial Br.

8-9 (C.A. App. 46-47). He urged Herron to get his "staff workin' on this right now, like hawks." *Id.* at 9 (C.A. App. 47). When Herron reported that there was a "real good possibility [he could] get about eight hundred thousand" in federal funds, petitioner confirmed that Herron's pay-off would be ten percent, or eighty-thousand dollars. *Id.* at 9-10 (C.A. App. 47-48). In another conversation, petitioner offered Herron $10,000 to threaten existing property owners with use of the MCDA's eminent domain power so as to secure their cooperation: "If you threaten that * * * you're gonna exercise your right for eminent domain at this site," petitioner stated, the property owners "will start thinkin', 'okay, Brian Herron . . . is gonna tell the MCDA to go forward to eminent domain us. So let's try to work ourself in the project.'" *Id.* at 6 (C.A. App. 44).

Before trial, petitioner moved to dismiss the indictment on the ground that Section "666(a)(2) is unconstitutional on its face as it does not require a connection between the alleged bribe and the federal funds." J.A. A4, A11. As part of its response, the government stated that the evidence would show a nexus between the bribery and federal funds:

> In the present case, the evidence similarly will demonstrate that (1) Councilperson Herron, the "agent" of the local government involved, had direct influence over the federal funds received by Minneapolis and the MCDA, (2) those federal funds were directly related to economic development programs of the City and the MCDA, (3) the economic development programs of the City and the MCDA were directly involved in the real estate development that was being proposed by the defendant and (4) that the bribe payments and offers of the defendant sought to directly corrupt the operation

> of the city's economic redevelopment process and even sought to corruptly obtain the very funds that the federal government had provided to the City and the MCDA.

J.A. A5.

The district court granted petitioner's motion to dismiss. The court ruled that Section 666(a)(2) "does not require the government to prove a connection between the offense conduct and the expenditure of federal funds," J.A. A25, and therefore "is an unconstitutional exercise of Congress's power under the Spending Clause," J.A. A35. The district court also held that the government's proffer that the evidence would establish a connection between the charged conduct and federal funds and programs was irrelevant, because the statute did not require such proof as an element of the offense. J.A. A25 n.9.

b. The court of appeals reversed and remanded, holding that Section 666 is not unconstitutional on its face. Pet. App. A1-A29.

i. The court of appeals began by examining Section 666's text to determine the elements of the offense it establishes. The court observed that Subsection (b) of Section 666 "requires proof that the relevant organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period." Pet. App. A4. But the court concluded that Section 666 does not, by its terms, impose a "requirement that the government prove some [other] connection between the offense conduct and federal funds beyond the express statutory requirement found in § 666(b)." *Ibid.*

> The plain language encompasses the activity of local agents wherever subsection (b) [ob]tains. There is no qualification that the prohibited conduct must

> have some relation to federal funds. Indeed, the statute proscribes the conduct of local agents in connection with "any" agency business or transaction. The word "any" is unambiguous and unqualified.

Id. at A8-A9. "The statute applies to all offense conduct * * * so long as the relevant agency received the requisite amount of federal benefits ($10,000) within the defined time period as required by § 666(b)." *Id.* at A9.

Reviewing the legislative history, the court of appeals found nothing to contradict the statute's text. Pet. App. A11-A14. Congress had enacted Section 666, the court observed, to "fill the gaps in the prior anticorruption scheme," *id.* at A12, and thereby "'safeguard finite federal resources from corruption and to police those with control of federal funds,'" *id.* at A11 (quoting *United States* v. *Rooney*, 37 F.3d 847, 851 (2d Cir. 1994)). Because the criminal laws that preceded Section 666 required proof that the affected funds were federal, the court further observed, those laws had proved inadequate where title had passed to the recipient before the funds were stolen and where the funds were commingled. *Id.* at A11-A12. Congress had therefore "decided that the most effective way to insure the integrity of federal funds disbursed to subnational agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the integrity of the recipient agencies." *Id.* at A12.

The court of appeals also rejected petitioner's argument that Section 666, so construed, is facially unconstitutional because it exceeds Congress's enumerated powers. Pet. App. A14-A29. The court first rejected the government's argument that Section 666 could be sustained under the Spending Clause itself. Relying on the fact that Section 666 does not impose a condition on a recipient of federal benefits but instead regulates the

conduct of third parties, the court concluded that Section 666 is not the typical sort of spending condition previously upheld by this Court. *Id.* at A15-A19.

Nonetheless, the court of appeals concluded that Section 666 is valid legislation under the Necessary and Proper Clause to protect and effectuate Congress's exercise of its spending powers. Pet. App. A19-A28. Far from seeking to regulate private conduct through an exercise of general police power, the court explained, Section 666 was designed to protect the efficacy of federal spending and Congress's control over federal funds by assuring the integrity of the entities receiving them. It is "an incontestable proposition," the court stated, "that the disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution." *Id.* at A21. Congress "has a legitimate right to protect these disbursements from misappropriation once made." *Ibid.*

The court also concluded that Section 666 is "plainly adapted" to protecting the integrity of federal disbursements and programs and is therefore "necessary and proper to the execution of the spending power" under *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Pet. App. A24. Although Section 666 might have been more narrowly crafted, the court noted, Congress reasonably determined that "the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds." *Id.* at A25. A more limited statutory regime had been "rendered toothless because of the difficulty of tracing federal funds once they had been disbursed." *Ibid.* In addition, the court observed, because "money is fungible and its effect transcends program boundaries," the "maladministration of funds in one part of an agency

can affect the allocation of funds, whether federal or local in origin, throughout an entire agency." *Ibid.* (quoting *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998)).

> Thus, to suggest that corruption involving a discrete department or section of an agency that does not itself receive federal funds or administer a federal program can have no effect on the integrity or efficacy of a federal program is to ignore the fact that money is fungible and that federal funds are often comingled with funds from other sources. Section 666 addresses this problem by policing the integrity of the entire organization that receives federal benefits.

Id. at A25-A26. Finally, the court rejected the suggestion that Section 666 is not "proper" legislation under the Constitution on the theory that it interferes with state sovereignty, explaining that the statute does not regulate the States as such, but instead regulates individuals whose conduct can threaten federal funds and federally funded programs. *Id.* at A21-A22 n.6.

ii. Judge Bye dissented. Pet. App. A29-A36. Although acknowledging that the majority's "reading of *M'Culloch* is, of course, received wisdom" and that "the majority makes a fairly convincing argument that the 'fit' between § 666(a)(2) and Congress' underlying objective to preserve the integrity of federal programs is rational," Judge Bye concluded that Section 666 is not "proper," within the meaning of the Necessary and Proper Clause. *Id.* at A31. Drawing on *Printz* v. *United States*, 521 U.S. 898 (1997), and *Alden* v. *Maine*, 527 U.S. 706 (1999), Judge Bye perceived state sovereignty limits on the type of legislation that can be deemed "proper." Pet. App. A31-A33. Because of the breadth and quantity of federal assistance provided to

state and local governments, Judge Bye concluded that Section 666 "federaliz[es] anticorruption law" and improperly "usurp[s] the traditional domain of state authority." *Id.* at A33.

SUMMARY OF ARGUMENT

Section 666 protects federal benefits and federally funded programs against significant corruption in the entities that receive the benefits. That protection is a constitutionally valid exercise of Congress's power.

I. Congress enacted Section 666 for the legitimate purpose of protecting the integrity of the federal funds it disburses to private organizations and State and local governments under federal programs. To that end, Section 666 proscribes corrupt efforts to influence a transaction or series of transactions of a private organization or State, local, or tribal government or an agency thereof involving something worth $5000 or more, if one further condition is met. 18 U.S.C. 666(a)(2). That condition is that "the organization, government, or agency" must have "receive[d], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). Those requirements limit Section 666 to significant acts of corruption where, because the relevant agency receives the requisite federal benefits, there is a strong federal interest in the integrity of federal funds and programs. As a matter of the statute's text, there is no further federal nexus requirement.

Congress enacted Section 666 because earlier criminal statutes, which required proof of an effect on specific federal funds or programs, had proved insufficient given the difficulty of tracing fungible funds, the peculiarities of funding mechanisms, and impediments

arising from the passage of title to the funds from the United States to the fund recipient. Congress therefore "decided that the most effective way to insure the integrity of federal funds disbursed by subnational agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the integrity of the recipient agencies" responsible for administering them. Pet. App. A12.

II. Section 666 is necessary and proper legislation to protect Congress's exercise of the Spending Power. Under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, Congress has authority to enact legislation that is "necessary," *i.e.*, "convenient, or useful" and "plainly adapted," to the execution of federal powers. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 354, 413, 421 (1819). Section 666 is "necessary" legislation. It ensures that federal funds are not diverted from their intended use and that corruption does not threaten the integrity of federal programs. Section 666 also ensures that federal funds do not subsidize acts of fraud and corruption.

The Constitution does not require that a statute addressing a matter of profound federal concern be perfectly calibrated so that every one of the statute's conceivable applications directly implicates that concern. Rather, Congress may enact legislation that sweeps somewhat more broadly when a narrower approach to the problem might jeopardize federal interests. Section 666 is not invalid on the theory that it requires the Court to pile inference upon inference to find a permissible federal interest. Section 666 is closely tied to the United States' strong interest in guarding against the threat to its funds and programs created by financial corruption in the agencies that administer them. While Section 666 may overlap with

traditional areas of state criminal law, it does so in order to protect distinct federal interests.

Section 666 is also "proper" legislation under the Necessary and Proper Clause. Section 666 neither regulates the States as sovereigns nor commandeers state officials. It therefore does not implicate state sovereignty interests. It imposes a requirement on individuals—subjecting acts of corruption to potential federal prosecution—only when an entity (private or governmental) has elected to accept and administer the requisite amount of federal funds under a federal program. Federalism principles do not preclude Congress from protecting the federal interests in those funds and programs.

Petitioner argues that the analysis in conditional-funding cases like *South Dakota* v. *Dole*, 483 U.S. 203 (1987), describes the limits of Congress's Necessary and Proper authority to implement the Spending Power, and that, under *Dole*, regulation of private parties is invalid. That argument, like petitioner's contention that Section 666 violates the Tenth Amendment, is misplaced. If petitioner were correct, *Dole* would preclude the federal government from criminalizing acts of corruption involving the theft from grant recipients of the federal funds themselves, and would remit the government to withholding federal funds from recipients. Nothing in the Constitution prevents Congress from directly imposing penalties on individuals whose criminal acts would frustrate legitimate federal spending programs.

III. Reduced to its essence, petitioner's argument is that, because Section 666 does not require case-specific proof that a federal interest has been adversely affected, the statute is capable of reaching instances where the federal interest is attenuated; accordingly,

he concludes, it is facially unconstitutional. Congress, however, had sound reasons for dispensing with such a case-by-case inquiry that would potentially leave federal programs and funds without sufficient protection. The legislature was not required to direct courts and juries to make a potentially elusive factual inquiry into effects on federal funds and programs. In any event, a claim that *some* applications of Section 666 may be beyond federal concern does not meet petitioner's burden of showing that Section 666 is unconstitutional "on its face." This Court has twice upheld convictions under Section 666, thus recognizing the constitutionality of its application to straightforward fraud and bribery cases involving federal funds and programs. To the extent that there are peripheral applications that might exceed Congress's constitutional authority, such concerns should be addressed through as-applied challenges in individual cases.

ARGUMENT

SECTION 666 IS A FACIALLY CONSTITUTIONAL EXERCISE OF CONGRESS'S AUTHORITY TO PROTECT THE INTEGRITY OF FEDERAL FUNDS AND PROGRAMS

Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare. U.S. Const. Art. I, § 8, Cl. 1. Congress also has corresponding authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, to protect that money and the integrity of the federal programs it supports. Congress enacted 18 U.S.C. 666 to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence." S. Rep. No. 225, 98th Cong., 1st Sess. 370 (1983). The legitimacy of that purpose is beyond

dispute. As this Court has observed, "grant funds to state and local governments 'are as much in need of protection * * * as any other federal money.'" *Dixson* v. *United States*, 465 U.S. 482, 501 (1984) (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544 (1943)).

There can be no serious question that bribing a local government official whose duties include managing federally funded programs and influencing the allocation of federal funds implicates the federal government's interest in the integrity of its funds and the programs they support. Petitioner contends, however, that Section 666 is "[f]acially [u]nconstitutional," Pet. Br. 24; Pet. Reply 1-2 ("The Petition is clear that the issue presented is a facial challenge to the constitutionality of 18 U.S.C. § 666."), because, in petitioner's view, Congress extended Section 666 too broadly and thereby reached cases in which the misconduct affected no federal program or federal funds. Pet. Br. 7-8. According to petitioner, the jurisdictional nexus required by Section 666(b)—the requirement that the "organization, government, or agency" at which the corruption is directed have "receive[d], in any one year period, benefits in excess of $10,000 under a Federal [assistance] program"—does not ensure that the prohibited corruption will "*uniformly* have the requisite connection to federal spending." Pet. Br. 33 (emphasis added).

Petitioner's claim of facial unconstitutionality must be rejected. Congress may enact statutes of sufficient breadth to achieve the legislature's goal of protecting its spending programs, even if some applications of the statute do not directly advance that goal. Where legitimate federal goals might be *under*protected and frustrated by narrower provisions, Congress may enact

statutes to avoid that pitfall, even if such laws have the potential to sweep in some circumstances that are of remote federal interest. The failure of Congress's earlier and narrower efforts to combat corruption touching on federal funds and programs demonstrated to the legislature that it had to do more than enact a statute directed solely at corruption with a proven effect on the federal funds themselves. Instead, Congress turned to an approach that focused on protecting the integrity of the entities that receive federal funds. That approach is constitutional.

I. Section 666, As Properly Construed By The Court of Appeals, Does Not Require Proof Of A Federal Nexus Beyond The Statutory Terms

Relying on the text of the statute and its legislative history, the court of appeals in this case held that Section 666 does not require the government to prove a federal interest in its funds or programs beyond the fact that "the relevant agency received the requisite amount of federal benefits ($10,000) within the defined time period as required in § 666(b)." Pet. App. A9. The overwhelming majority of courts of appeals that have addressed the issue, including the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, have agreed, see Pet. Br. 20 n.1, as does petitioner. Pet. Br. 17, 20-22. That conclusion is correct.[3]

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[3] The Second and Third Circuits have held that the government must prove some further nexus between the corruption and federal funds or programs. See *United States* v. *Zwick*, 199 F.3d 672, 682 (3d Cir. 1999); *United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999). No party to this case supports that construction.

A. The Text Of Section 666 Unambiguously Defines The Elements Of The Offense

Section 666(a)(2) addresses corruption only when at least two conditions are met. First, the corruption must have concerned a transaction or series of transactions of an organization or State, local, or tribal government or an agency thereof involving something worth $5000 or more. 18 U.S.C. 666(a)(2). Second, "the organization, government, or agency" must have "receive[d], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). The first requirement limits Section 666's application to significant acts of corruption. The second limits Section 666 to cases in which, because the organization, government, or agency receives substantial federal funds under a federal program, the United States has a significant interest in preventing corruption and theft. Section 666 thus "limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions." *United States* v. *Westmoreland*, 841 F.2d 572, 578 (5th Cir.), cert. denied, 488 U.S. 820 (1988).

As this Court has observed, Section 666 provides a "broad definition of the 'circumstances' to which the statute applies"—those cases in which the "organization, government, or agency" the defendant sought to corrupt "receive[d] the statutory amount of benefits under a federal program." *Salinas*, 522 U.S. at 57 (quoting 18 U.S.C. 666(b)). The statute "provides no textual basis for" further "limiting the reach of [its] bribery prohibition." *Ibid.* To the contrary, "[s]ubject to the $5,000 threshold for the business or transaction in question, the statute forbids" corruption "in connection with *any* business transactions, or series of transactions of" the covered "organization, government, or agency." *Ibid.* (emphasis added). "The word 'any,' which prefaces the business or transaction clause, undercuts" the argument that "federal funds must be affected to violate" the statute. *Id.* at 56-57.

Although *Salinas* left open whether Section 666 "requires some other kind of connection between a bribe and the expenditure of federal funds" than the nexus expressly required by Section 666(b), 522 U.S. at 59, the same reasoning that supported the Court's conclusion in *Salinas* that no proof of an actual effect on federal funds is required, *id.* at 56-57, applies here as well. There is no language in the statute requiring some other nexus to federal funds beyond the requirement that the relevant entity received the statutory amount of benefits under a federal program.

B. The Purpose And Background Of Section 666 Confirm That It Requires No Federal Nexus Beyond That Set Forth In The Text

The conclusion drawn from Section 666's text—that no additional federal nexus is required beyond the explicit requirement that the covered entity have received the specified federal benefits—is reinforced by the provision's origin and purposes. Section 666 was designed to "augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery" to protect "the vast sums of money distributed through Federal programs." S. Rep. No. 225, *supra*, at 370; see *Salinas*, 522 U.S. at 58-59. The provision was enacted in response to the government's previous inability to reach significant misappropriations and corruption in federally funded assistance programs. See pp. 2-5, *supra*. Before Section 666's enactment, federal prosecutions were often hindered by the fact that title to the

relevant funds had "passed to the recipient before" the money was stolen, or because "the funds [we]re so commingled that the Federal character of the funds [could] []not be shown." S. Rep. No. 225, *supra*, at 369. That gave "rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retain[ed] a strong interest in assuring the integrity of such program funds." *Ibid.* Section 666 filled that gap by eliminating any requirement that the misconduct be traced to specific federal monies. Instead, Section 666(b) required that the institution, government, or agency at issue have received a specified amount of federal funds. 18 U.S.C. 666(b).[4]

As the court of appeals observed, Congress "decided that the most effective way to insure the integrity of federal funds disbursed by subnational agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the

[4] *Westmoreland*, 841 F.2d at 577 ("Congress specifically chose" to "preserve the integrity of federal funds" by "enacting a criminal statute that would eliminate the need to trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds"); *United States* v. *Wyncoop*, 11 F.3d 119, 122 (9th Cir. 1993) ("[W]hen Congress enacted section 666, it intended to 'protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of federal funds to a particular illegal transaction.'") (quoting *United States* v. *Simas*, 937 F.2d 459, 463 (9th Cir. 1991)); *United States* v. *Zwick*, 199 F.3d 672, 679 (3d Cir. 1999) ("By its terms, § 666 fills" the "voids" in prior legislation because "it imposes no title or tracing requirements and covers non-federal employees."); *United States* v. *Paradies*, 98 F.3d 1266, 1288 (11th Cir. 1996) ("the government is not required under § 666 to trace the flow of federal funds"), cert. denied, 521 U.S. 1106 (1997); *United States* v. *Foley*, 73 F.3d 484, 492 (2d Cir. 1996) ("the government is not required to trace the agent's corrupt expenditures to the federal program funds").

integrity of recipient agencies." Pet. App. A12. "[B]ecause § 666 changed the focus" from the policing of identifiable "federal funds to policing the agencies that receive and administer those funds, the argument that there must be a nexus between the offense conduct and the federal funds beyond that explicitly provided for in § 666(b) seems inconsistent" with Congress's goals. *Id.* at A12-A13.[5]

The scope of Section 666 is also illuminated by one of the decisions that prompted it: *United States* v. *Del Toro*, 513 F.2d 656, 661-662 (2d Cir.), cert. denied, 423 U.S. 826 (1975), which had converted the happenstance of funding, disbursement, and accounting mechanisms into impediments to federal prosecution. See *Salinas*, 522 U.S. at 58-59; S. Rep. No. 225, *supra*, at 369. In *Del Toro*, the Second Circuit overturned the federal bribery conviction of a city employee, "even though federal funds would eventually cover 100% of the costs and 80% of the salaries of the program he administered" because, at the time of the bribe, the city "had not yet entered a formal request for federal funding." *Salinas*, 522 U.S. at 58-59. There could be no prosecution, *Del Toro* held, because "[t]here were no existing committed federal funds" when the misconduct occurred. *Salinas*, 522 U.S. at 59 (quoting *Del Toro*, 513 F.2d at 662). In *Salinas*, this Court explained that construing Section 666 to require proof that a bribe is traceable to federal

[5] An earlier proposal from which Section 666 was derived, see S. Rep. No. 225, *supra*, at 369 & n.1, would have required the government to prove that "the recipient's conduct [wa]s related to the administration of" a federally funded "program." See S. Rep. No. 307, 97th Cong., 1st Sess. 726, 803 (1981) (discussing S. 1630, 97th Cong., 1st Sess. § 1751(c)(1)(I) (1981)). Congress's decision to dispense with such a requirement when enacting Section 666 in 1984 supports the conclusion that Congress did not wish to demand such proof in particular cases.

funds "would run contrary to the statutory expansion that redressed the negative effects of the Second Circuit's narrow construction of § 201 in *Del Toro*." *Ibid.* Requiring the government to prove a particular nexus to federal funds or programs beyond that provided in Section 666(b) would have the same effect here.

C. Section 666 Is Not Ambiguous

In concluding that Section 666 requires a federal nexus not required by the statute's operative language, the Third Circuit reasoned principally that the statute's title ("Theft or bribery concerning programs receiving Federal funds") introduced ambiguity into the statute's meaning; the court then applied the canon that an ambiguous statute should be construed to avoid serious constitutional doubts. *United States* v. *Zwick*, 199 F.3d 672, 682-687 (3d Cir. 1999). While a statutory title may be a "tool[] available for the resolution of a doubt about the meaning of a statute," *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (internal quotation marks omitted), it is not a tool for *creating* ambiguity. "The title of a statute," this Court has held, "cannot limit the plain meaning of the text"; rather, "for interpretive purposes, it is of use only when it sheds light on some ambiguous word or phrase." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (punctuation altered and brackets omitted). Here, the relevant textual provisions are clear and unambiguous: They reach corruption in "*any*" business of a covered entity. *Salinas*, 522 U.S. at 57 (emphasis added). And, absent ambiguity, there is no room for the application of the canon of constitutional avoidance. *Id.* at 60-61; *Yeskey*, 524 U.S. at 212. In any event, as discussed below, there is no serious doubt that Section 666 is facially constitutional.

II. Section 666 Is Necessary And Proper Legislation To Ensure The Integrity Of Federal Funds And Programs

Congress has the power to spend federal revenues to "provide for * * * the general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. Congress's authority "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936); accord *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Congress also has the authority to "make all Laws which shall be necessary and proper for carrying into Execution" its powers, including the spending power. U.S. Const. Art. I, § 8, Cl. 18.

Those grants of authority entitle Congress to enact criminal statutes that are designed to protect federal funds and the programs they support. Since *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been settled that Congress has constitutional authority to enact not merely legislation that is "indispensable" to the exercise of its enumerated powers, but also such legislation as Congress in its judgment deems "necessary and proper," U.S. Const. Art. I, § 8, Cl. 18, *i.e.*, "convenient, or useful" and "plainly adapted" to the execution of federal power, so long as the means chosen are not prohibited by the Constitution. 17 U.S. (4 Wheat.) at 413, 421. It is "an incontestable proposition that the disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution." Pet. App. A21. Congress therefore also "has a legitimate right to protect these disbursements from misappropriation once made." *Ibid.*

Section 666 is both "necessary" and "proper" to the attainment of important federal objectives, and thus is facially valid. Every court of appeals that has considered Section 666's facial constitutionality has upheld the statute. *United States* v. *Edgar*, 304 F.3d 1320, 1325 (11th Cir.) ("As a means of ensuring the efficacy of federal appropriations to comprehensive federal assistance programs, the anti-corruption enforcement mechanism strikes us as bearing a sufficient relationship to Congress's spending power to dispel any doubt as to its constitutionality."), cert. denied, 537 U.S. 1078 (2002); Pet. App. A25 ("Section 666 is a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States [through spending]."); *United States* v. *Bynum*, 327 F.3d 986, 991 (9th Cir.) ("We agree with the Eighth and Eleventh Circuits that § 666 is facially constitutional."), cert. denied, 124 S. Ct. 279 (2003).

This Court has repeatedly recognized that a statute is not unconstitutional on its face merely because it "might operate unconstitutionally under some conceivable set of circumstances." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Rather, "the challenger must establish that *no set of circumstances exists* under which the [law] would be valid." *Ibid.* (emphasis added); see *Anderson* v. *Edwards*, 514 U.S. 143, 155-156 n.6 (1995) (parties challenging statute "on its face" cannot "sustain their burden even if they show[] that a possible application of the rule" is invalid); *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) ("To prevail" on "a facial challenge," the party "must establish that no set of circumstances exists under which the [regulation] would be valid") (quoting *Salerno*, 481 U.S. at 745); *United States* v. *Raines*, 362 U.S. 17, 21 (1960) ("one to

whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"). Petitioner's challenge falls well short of that standard.[6]

A. Congress Has The Authority To Protect Federal Spending Under The Necessary And Proper Clause

Congress's authority to enact criminal laws to protect federal funds and programs has long been recognized by this Court. In *United States* v. *Hall*, 98 U.S. 343 (1878), this Court upheld a federal statute making it a criminal offense for a guardian, agent, or attorney to embezzle a soldier's federal pension, rebuffing the claims (1) that such a law would effectively "assume all the police regulation of the States," and (2) that, because "State law authorized the guardian to receive the pension-money, the defendant cannot be subjected to an indictment under an act of Congress for embezzling it after he lawfully received it." *Id.* at 349. "Because

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[6] Even in those circumstances where members of this Court have supported a different formulation than the "no set of circumstances" test articulated in *Salerno*, they have at a minimum required that the statute's unconstitutional sweep be so great in relation to its constitutional applications, and so central to the statute, as to warrant the strong medicine of facial invalidation. See, *e.g.*, *Janklow* v. *Planned Parenthood*, 517 U.S. 1174, 1176 n.1 (1996) (Stevens, J., respecting denial of certiorari); *Chicago* v. *Morales*, 527 U.S. 41, 55 n.22 (1999) (Stevens, J., joined by Ginsburg and Souter, JJ.). Even in the First Amendment context—where concerns about chilling effects have led this Court to permit overbreadth challenges—the Court will not apply "the 'strong medicine' of overbreadth invalidation" unless the potentially unconstitutional applications are substantial both in absolute terms and in relationship to the law's legitimate applications. *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2197-2198 (2003).

the fund proceeds from the United States, * * * Congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary." *Id.* at 357-358. The Court observed: "[T]hroughout the entire period since" the Constitution's adoption, "it has been the unchallenged practice of the legislative department of the government, with the sanction of every President, including the Father of the Country, to pass laws to prevent the diversion of [federal] pension-money from inuring solely to the use and benefit of those to whom the pensions are granted." *Id.* at 354. If Congress may grant pensions, Congress "may by all suitable laws guard and protect the fund thus devoted from being diverted from its object by either the craft or the extortion of unscrupulous agents." *Id.* at 356 (citing *United States* v. *Marks*, 26 F. Cas. 1162 (C.C.D. Ky. 1869) (No. 15,721)).

The same analysis applies when Congress appropriates the funds for programs administered by state and local governments pursuant to cooperative federalism agreements. Federal "grant funds to state and local governments 'are as much in need of protection * * * as any other federal money.'" *Dixson*, 465 U.S. at 501 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544 (1943)). For that reason, the Court in *Dixson* construed a federal statute barring the corruption of "public officials" to extend to local officials administering federal block grant funds. See *ibid.* Similarly, in *Westfall* v. *United States*, 274 U.S. 256 (1927), the Court rejected the argument that Congress could not punish frauds perpetrated against a "State bank" that participated in the Federal Reserve System where the statute "applie[d] indifferently whether there is a loss to the [Federal] Reserve Banks or not." *Id.* at 258-259. "[E]very fraud like the one before us weakens the

member bank and therefore weakens the System," the Court stated. *Id.* at 259.

This Court has also upheld Congress's interest in ensuring the integrity of federal funds, programs, and the institutions receiving federal funds when addressing Section 666 itself. In *Fischer* v. *United States*, 529 U.S. 667 (2000), the Court concluded that the "Government has a legitimate and significant interest in prohibiting financial fraud or acts of bribery being perpetrated upon Medicare providers," which receive federal benefits to achieve federal policy ends. *Id.* at 681. Likewise, in *Salinas*, 522 U.S. at 60-61, the Court held that "there is no serious doubt about" Congress's constitutional authority to punish the taking of bribes by a county official for according favorable treatment to a federal prisoner whom the County was holding for the United States under contract. Contrary to petitioner's suggestion (Br. 28), *Salinas*'s constitutional holding was not mere "dictum." This Court squarely "decide[d] that, as a matter of statutory construction, § 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds *and* that under this construction the statute is constitutional as applied in this case." 522 U.S. at 61 (emphasis added). Just as the power "to establish post offices and post roads" encompasses the power to "punish those who steal letters," *M'Culloch*, 17 U.S. (4 Wheat.) at 417, the power to spend for the public welfare encompasses the power to punish those whose theft and corruption threatens federal spending and programs.

B. Section 666 Is "Necessary" Federal Legislation To Protect Federal Benefits Programs

Enacted to protect the integrity of federal funds and the programs they finance, Section 666 is necessary legislation to protect the effectiveness of Congress's exercise of its spending power. Section 666 ensures that federal funding is not diverted from its intended purpose and that federal programs are not impaired by corruption. *United States* v. *Brunshtein*, 344 F.3d 91, 97 (2d Cir. 2003) ("Congress enacted § 666 to 'safeguard finite federal resources from corruption and to police those with control of federal funds.'") (quoting *United States* v. *Rooney*, 37 F.3d 847, 851 (2d Cir. 1994)). Section 666 also ensures that fraudulent acts do not threaten federal programs by depriving program participants of necessary resources. In *Fischer*, the Court explained that "financial fraud or acts of bribery * * * perpetrated upon Medicare providers" impermissibly "threaten the [Medicare] program's integrity" by "rais[ing] the risk participating organizations will lack the resources requisite to provide the level and quality of care envisioned by the program." 529 U.S. at 681-682. Likewise, in *Salinas*, the Court upheld the conviction of a county official for taking bribes in return for affording preferential treatment to a federal prisoner housed in a local facility "paid for in significant part by federal funds." 522 U.S. at 59. Even though the corruption did not necessarily impose any additional costs on the United States, it represented "a threat to the integrity and proper operation of the federal program" at issue. *Id.* at 61.

Judicial review of the "necessity" of employing a particular means to achieve Congress's purposes is deferential. As this Court explained shortly after this Nation's founding, Congress has discretion to "employ

those [means] which, in its judgment, would most advantageously effect the object to be accomplished." *M'Culloch*, 17 U.S. (4 Wheat.) at 419. "[W]here the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to * * * tread upon legislative ground." *James Everard's Breweries* v. *Day*, 265 U.S. 545, 559 (1924). "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." *Legal Tender Case*, 110 U.S. 421, 441 (1884).

Amicus Cato Institute invites this Court to reconsider the "received wisdom" of *M'Culloch* and to adopt an intermediate scrutiny standard articulated by James Madison in a private letter—that "laws executing federal powers must have a 'definite connection' to and 'some obvious and precise affinity' with permissible governmental ends." See Cato Br. 3; see *id.* at 18-22. This Court, however, has employed *M'Culloch*'s "plainly adapted," "conducive," and "appropriate" formulations for the more than 180 years since *M'Culloch* was decided. See, *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *United States* v. *Butler*, 297 U.S. 1, 69 (1936). Just last Term, this Court applied *M'Culloch* to reject a Necessary and Proper Clause challenge to 28 U.S.C. 1367(d), which tolls the limitations period for certain state-law claims in state court: "[I]t suffices that § 1367(d) is 'conducive to the due administration of justice' in federal court, and is 'plainly adapted' to that end." *Jinks* v. *Richland County*, 123 S. Ct. 1667, 1671 (2003). Amicus offers no compelling justification for abandoning that longstanding constitutional formulation in favor of Madison's private critique of *M'Cul-*

loch's reasoning and the decision itself. Cato Br. 19 (citing Letter of Sept. 2, 1819 to Spencer Roane, in 8 *The Writings of James Madison* 447 (Gaillard Hunt ed. 1908)).[7]

1. *Congress selected reasonable means of achieving its interest in the protection of federal funds and programs*

Congress enacted Section 666 to broaden the sweep of federal law only after attempting to protect federal

[7] Contrary to Amicus's suggestion (Cato Br. 13-16), *M'Culloch* (like its progeny) makes it unmistakably clear that Congress is entitled to considerable deference in judgments about necessity. See, *e.g.*, 17 U.S. (4 Wheat.) at 415 (The Framers left it "in the power of Congress to adopt any" means "which might be appropriate, and which were conducive to the end."); *id.* at 420 ("[I]t cannot be construed to restrain the [express] powers of Congress, or to impair the right of the legislature to exercise *its best judgment* in the selection of measures to carry into execution the constitutional powers of the government.") (emphasis added). Some federal courts and commentators have equated *M'Culloch*'s "plainly adapted," or "appropriate" and "conducive," standard with the rational basis test. See, *e.g.*, *United States* v. *Plotts*, 347 F.3d 873, 878 (10th Cir. 2003); *Edgar*, 304 F.3d at 1325-1326; *Laro* v. *New Hampshire*, 259 F.3d 1, 6 (1st Cir. 2001); *United States* v. *Lue*, 134 F.3d 79, 84 (2d Cir. 1998); 1 Laurence H. Tribe, *American Constitutional Law* § 5-3, at 805 (3d ed. 2000). This case does not require the Court to determine whether the "plainly adapted" test requires a closer fit than the rational basis test, because Section 666(a)(2) is more than merely a rational way to serve Congress's legitimate interest in protecting federal funds and programs that implement the Spending Power. Rather, it directly and substantially serves that goal in a reasonable manner, as is evidenced by experience that revealed that more limited means were inadequate. See pp. 3-5, 19-22 & n.4, *supra*; pp. 31-33, *infra*. And even Amicus Cato Institute does not question *M'Culloch*'s holding that the means chosen by Congress need not be indispensable to the achievement of a legitimate legislative purpose in order to be "necessary and proper."

funds and programs through more limited statutes that had proved "toothless." Pet. App. A25. Congress's long experience with those earlier statutes showed that focusing on the federal funds themselves rather than the recipient was inadequate because of the difficulty of tracing money, as well as the effects of commingling and varying accounting and disbursement methodologies. See pp. 3-5, 19-22 & n.4, *supra*; Pet. App. A25. Congress therefore made the sensible "determination that the most effective way to protect the integrity of federal funds" and federally funded programs was not to police the funds directly but "to police the integrity of the agencies administering those funds." Pet. App. A25; see *Fischer*, 529 U.S. at 678 (The language of Section 666 "reveals Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs."); *United States* v. *Bonito*, 57 F.3d 167, 172 (2d Cir. 1995) (Section 666 "seeks to preserve the integrity of federal funds by assuring the integrity of the organization that receives them.") (quoting *Westmoreland*, 841 F.2d at 578), cert. denied, 516 U.S. 1049 (1996).

Congress's decision to focus on the corruption of institutions receiving federal funds also makes good sense even apart from the problems that plagued earlier statutes. The "federal government has an obvious interest in the incorruptibility of the City officials who are responsible for ensuring the transmission of federal funds to specific City programs." *Brunshtein*, 344 F.3d at 98. The "integrity of federal funds is placed at risk when the agency that receives those funds is corrupted." *Id.* at 100. An analogy to the private sector makes that clear:

> In the private sector, what would a reasonable funding partner who has advanced $[28] million do after

> learning that its service partner takes kickbacks, albeit regarding matters not within the partnership's scope? The funding partner might well dissolve the partnership rather than wait for the service partner's corruption to widen and infect the partnership's dealings.

United States v. *Lipscomb*, 299 F.3d 303, 332 (5th Cir. 2002) (opinion of Wiener, J.); see also *Edgar*, 304 F.3d at 1327 ("It is reasonable for Congress to conclude that any corruption of such recipient organizations * * * endangers the comprehensive programs in which the organizations participate, and thus the effective exercise of the Congressional spending power as well."). No principle of constitutional law requires Congress to wait until an official's corruption widens and infects a specific federal program and identifiable federal funds, when a reasonable, similarly situated private party would not.

This case illustrates the wisdom of that approach. The corruption at issue here (which involved an effort to distort the allocation of federal funds) came to light as a result of Councilman Herron's arrest for acts of corruption in more local matters. See Trial Br. 3, 14-15; Gov't C.A. Br. 5. Once corruption begins, those involved rarely differentiate between the local and federal programs the agency administers or carefully confine their activities to the former. The presence of corrupt officials in an entity receiving federal benefits also may indicate that the entity has broader problems, such as inadequate controls, even if the specific corruption identified does not involve federal funds or a federally funded activity.

In addition, "[m]oney is fungible and its effect transcends program boundaries." *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.) (Easterbrook, J.), cert.

denied, 525 U.S. 879 (1998). As a result, even where an agency operates some programs that receive federal funds and some that do not, corruption in non-federal programs can impair the agency's administration of federal money. See Pet. App. A25 ("maladministration of funds in one part of an agency can affect the allocation of funds, whether federal or local in origin, throughout an entire agency"). Corruption in locally funded programs can drain commingled resources from or place additional burdens on federally funded programs, impairing their achievement of federal program goals. See, *e.g.*, *United States* v. *DeLaurentis*, 230 F.3d 659, 662 (3d Cir. 2000).

Indeed, as the court of appeals explained in *Grossi*, a program that (at least as an accounting matter) appears funded by local revenues will have "more to spend * * * (or dangle as a lure for bribes) if the federal government meets some of the [agency]'s other expenses." 143 F.3d at 350. An agency that administers substantial federal funds will often be strengthened by the federal funds, increasing the opportunities for corruption and their oppressive effect. In this case, for example, petitioner paid Councilman Herron to threaten property owners with the MCDA's use of its eminent domain powers so that they would accede to his development plan on their own. See pp. 6, 7, *supra*. That threat was undoubtedly more credible because the MCDA, backed by millions of federal dollars, had the resources (for litigation and payment of just compensation) to make good on the threat.

2. Congress is not limited to protecting against corruption in federal instrumentalities

Petitioner argues (Br. 26-31) that the federal government's authority to address corruption does not extend beyond federal institutions and instrumentali-

ties. That argument fails to account for the obvious federal interest in foreclosing the theft and corruption of federal money held by organizations administering federal programs. And it overlooks a century of precedent recognizing the legitimacy of that interest—including cases like *Hall*, *supra*, which upheld the federal conviction of a guardian for embezzling a soldier's federal pension money; *Salinas*, *supra*, which upheld the conviction of a county official for corruptly favoring a federal prisoner in state facilities financed with federal monies; *Westfall*, *supra*, which upheld a conviction for defrauding a state bank participating in the Federal Reserve System; and *Fischer*, *supra*, which recognized the government's strong interest in prosecuting fraud aimed at Medicare providers. See pp. 25-27, *supra*. This Court's decision in *Dixson* all but forecloses petitioner's argument, interpreting the term "public official" in the federal criminal bribery statute, 18 U.S.C. 201(a), to include local officials administering federal funds:

> [W]hen one examines the structure of the program and sees that [it] vests in local administrators * * * the power to allocate federal fiscal resources for the purpose of achieving congressionally established goals, * * * it becomes clear that these local officials hold precisely the sort of positions of national public trust that Congress intended to cover * * *. The Federal Government has a strong and legitimate interest in prosecuting petitioners for their misuse of Government funds.

465 U.S. at 500-501.

Petitioner does not meaningfully distinguish those cases, none of which involved "instrumentalities of the

United States" as that phrase is ordinarily used.[8] Nor does petitioner explain why, if the individuals and institutions at issue in those cases—the private person in *Hall*, the state bank in *Westfall*, the local officials in *Dixson*, the county prison in *Salinas*, and the Medicare providers in *Fischer*—would qualify as federal instrumentalities for purposes of determining the constitutionality of those statutes, the entities receiving and administering funds under federal programs covered by Section 666 would not.

Indeed, petitioner effectively acknowledges that his position would draw into question "the constitutionality of 18 U.S.C. § 201, as interpreted in *Dixson*," Pet. Br. 27 n.2, and relies on the *Dixson* dissent, see Pet. Br. 29. But not even the dissenters in *Dixson* questioned Congress's *power* to impose criminal liability on corrupt officials with responsibility over federal programs and those who corrupt them. The dissenters merely were of the view that Congress had not exercised that power there. See 465 U.S. at 510 (federal programs should "not be interpreted to deputize States or their political subdivisions to act on behalf of the United States" within the meaning of Section 201 "unless such deputy status is expressly accepted or, where lawful, expressly imposed"; contrasting 1976 amendments to the Grain Standards Act). The Constitution does not "make the extent" of Congress's ability to "safeguard" federal

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[8] Petitioner attempts to distinguish *Salinas* on the ground that the County, its prison, or the guards were "instrumentalities of the United States." Br. 28. *Salinas* certainly did not hold that to be the case. Nor is it clear that the principles articulated in *Westfall*, *supra*, cited in *Salinas*, 522 U.S. at 61, are limited to federal instrumentalities. *Westfall* itself stands for the proposition that no actual loss to a federal institution is required to establish congressional authority, so long as the conduct might threaten a federal program. 274 U.S. at 258-259.

funds dependent on the Treasury's continued possession of those funds or "the bookkeeping devices used for their distribution." *Id.* at 501; see *Hess*, 317 U.S. at 544 ("Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states.").

3. *This Court's decisions in* Lopez *and* Morrison *lend no support to a claim that Section 666 reaches too far*

Petitioner invokes this Court's Commerce Clause decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), in arguing that the corruption reached by Section 666 is too attenuated from federal interests. Pet. Br. 32-33.[9] In particular, petitioner argues that Section 666, like the statutes at issue in those cases, can be sustained only if the Court is willing "to pile inference upon inference in a manner that" would accord the United States a "general police power of the sort retained by the States." Pet. Br. 33 (quoting *Lopez* 514 U.S. at 567). The Commerce Clause analysis in *Lopez* and *Morrison* is not at issue here. This case does not involve an exercise of Congress's power to enact criminal laws to effectuate a specific enumerated grant of regulatory authority. Instead, it involves Congress's power to protect the integrity of benefits programs and federal funds established under its Spending Clause power. Congress's authority to prohibit criminal acts

[9] Petitioner raises this issue in contending that Section 666, viewed as a condition on federal spending, fails the "germaneness" or "relatedness" requirements for such conditions under *South Dakota* v. *Dole*. Pet. Br. 32. The government addresses below the argument that *Dole* provides the proper lens through which to analyze Section 666. See pp. 41-45, *infra*.

that threaten its expenditures and programs is not subject to analysis under *Lopez* and *Morrison*.

In any event, no piling of inferences is necessary to sustain Section 666. That provision directly serves Congress's legitimate interest in preserving the integrity of federal funds and the programs they finance. It ensures the incorruptibility of entities to which Congress entrusts its funds and programs for administration. It eliminates impediments (*e.g.*, tracing requirements) that impaired the effectiveness of earlier laws. And it ensures that federal funding does not subsidize corruption. To the extent that a demonstrable adverse effect on federal interests is not present in every case, Congress was permitted to dispense with one. The Constitution does not demand a perfect fit between the federal interest and every possible application of the statute Congress enacts to serve that interest. The standard is whether the statute is "plainly adapted," or "convenient" and "useful," to a legitimate federal end. See pp. 23, 28-30, *supra*. Consequently, where Congress enacts a statute to address a problem squarely within national competence, the legislation may sweep somewhat more broadly than the underlying purpose if necessary to ensure its effectiveness. As this Court explained when rejecting an argument virtually indistinguishable from petitioner's in *Westfall*, *supra*, see Br. for Plaintiff in Error, No. 766, at 15-17 (Feb. 24, 1927): "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so." 274 U.S. at 259.

The fact that Section 666 reaches conduct that traditionally falls within the scope of state criminal law does not prevent Congress from protecting federal interests. As the court of appeals explained, "were we to conclude

that Congress lacked the authority to legislate in this area, then the protection of federal funds would be left to the whim of state and local officials—perhaps even the same officials who pose a threat to the integrity of the federal funds in the first place and who therefore possess a strong disincentive to protect them." Pet. App. A28. The court concluded that "[t]he proposition that the federal government is powerless to vindicate its own interests is clearly untenable." *Ibid.* *M'Culloch* makes the same point. "To impose on [the United States] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." 17 U.S. (4 Wheat.) at 424.

Sustaining Section 666 would hardly accord the United States a general police power or "obliterate the distinction between what is national and what is local." Pet. Br. 32. Section 666 does not rest on putative authority to regulate all the activities on which Congress may spend federal funds, or all activities that may affect the success of federally funded programs. Section 666 instead rests on the proposition that, because the United States has an interest in ensuring the integrity of its funds and programs, it may pursue that interest by policing the integrity of the entities to which its funds and programs are entrusted. Consequently, the reach of Section 666, and Congress's ability to enact statutes like it, is limited both by the finite nature of the federal fisc, and by the direct connection between the prohibition on financial corruption in agencies administering federal program funds and the

interest in protecting those federal funds and programs.[10]

C. Section 666 Is "Proper" Legislation Under The Constitution

Petitioner suggests (Br. 40) that Section 666 violates "the sovereignty of the States" under *Alden* v. *Maine*, 527 U.S. 706 (1999), and *Printz* v. *United States*, 521 U.S. 898 (1997), and therefore is not "proper" legislation under the Necessary and Proper Clause. That argument lacks merit.

Neither *Alden* nor *Printz* is applicable here. In *Alden*, the statute sought to allow private citizens seeking damages to hale the State into its own courts, notwithstanding the State's claim to sovereign immunity. 527 U.S. at 730. In *Printz*, the statute sought to "conscript[] the States' officers" into service "to administer [and] enforce a federal regulatory program." 521 U.S. at 935. Section 666 does not run afoul of "the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits,

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[10] The contrast between Section 666's scope and the hypothetical prohibition on the solicitation of adultery by officials of agencies receiving federal benefits posited by the Cato Institute (at 24) underscores that difference. It is not immediately obvious how the solicitation of adultery would pose a threat to federal funds or programs, since the misconduct involves the officials' private lives and is not financial in nature. Consequently, the link to any federal interest would have to rest on an attenuated chain of reasoning—that the prohibited conduct demonstrates poor moral character; that those moral shortcomings may not be limited to the offending official's private life; and, that if the lack of moral rectitude extends to the official's public responsibilities, it might include a willingness to engage in financial corruption affecting federal funds and programs. Section 666, in contrast, directly addresses corruption itself, and only in connection with the business of an agency that receives substantial funds under a federal program.

without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" *Alden*, 527 U.S. at 730. Nor does it "conscript[]" or "commandeer" state officers into federal service. *Printz*, 521 U.S. at 929, 935. Quite the opposite: the federal obligation of public employees to refrain from corruption results from a decision by the agency, state, or local government to accept federal money and administer a federal program. Section 666 imposes precisely the same duties on the agents of *private* organizations that choose to receive federal money.[11] Petitioner offers no reason why the United States cannot insist that the state and local government recipients of federal funds operate with the same level of freedom from corruption as private ones.

Petitioner also asserts (Br. 36) that Section 666 blurs state and local accountability for prosecuting corruption in state entities. But many statutes of unquestioned constitutionality, including the mail and wire fraud statutes and the federal securities laws, create overlapping coverage. There is certainly no federalism objection where the federal legislation is plainly adapted to the service of legitimate federal interests and leaves the States both free to make their own enforcement decisions and to be held politically accountable for those choices. As the Court explained in *Westfall*:

> Of course an act may be criminal under the laws of both jurisdictions. * * * [I]f a state bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. The general proposition is too plain to need more than statement.

274 U.S. at 258.

[11] It is therefore inaccurate to assert that Section 666 "applies only to State and local institutions." Pet. Br. 26. It applies to private "organizations" receiving the requisite amount of federal funds, such as the Medicare providers at issue in *Fischer*, and to state, local, and tribal institutions that do likewise. See 18 U.S.C. 666(a).

D. Petitioner Is Not Assisted By His Reliance On The Standards Of *South Dakota* v. *Dole*

1. *The* Dole *test for spending conditions does not exhaust Congress's "necessary and proper" authority*

Petitioner argues that, in the spending area, the "necessary and proper" test of *M'Culloch* has been subsumed in and superseded by this Court's conditional funding cases, such as *South Dakota* v. *Dole*, 483 U.S. 203 (1987). Br. 37-40. He asserts that the *Dole* test incorporates all of Congress's necessary and proper power to implement the Spending Clause. According to petitioner, the United States' interests are satisfied if the grant recipient complies with its contractual obligations—or if, in the event of breach, the recipient "*compensates* the Federal Government or a third-party beneficiary * * * for the loss caused by that failure." Pet. Br. 29-30. In arguing that *Dole* occupies the field and that Congress cannot reach beyond imposition of conditions on the grant recipient, petitioner is, in effect, arguing that the federal government could not prosecute a state official even if that official stole the federal funds themselves or accepted a bribe in direct connection with a federal program. Congress, petitioner seems to argue, is limited to the protection of its funds by imposing some sort of anti-corruption condition and then withdrawing the funds if the condition is not satisfied. That position cannot be correct.

The present case illustrates the point. Like many similar cases, it does not involve a breach of conditions by the funding recipients. It involves the efforts of individuals like petitioner and the local official he bribed to corrupt the operations of otherwise innocent governmental entities administering federal program funds. Petitioner nowhere explains why it would make sense for those institutions, and the citizens they serve, to be punished for his and Herron's misconduct. See *Lipscomb*, 299 F.3d at 333 (Wiener, J.) (fiscal reprisals directed at a fund recipient would cause the local populace, which is "by definition innocent of official corruption," to "suffer a cut in federally funded services"). That would defeat the goal of the spending, which is to provide federal funding to serve public needs, not to take funds away from local government recipients to make up for federal corruption losses. *Ibid.* Nor would petitioner's proposed remedy deter individuals who seek to enrich themselves through the corruption of public agents in agencies that receive federal funds and administer federal programs, since the burdens of that remedy fall on the funding recipient rather than the criminally corrupt. Petitioner cites no case that prohibits Congress from protecting its interest in disbursed federal funds and federal programs by imposing criminal prohibitions on the individual wrongdoers. To the contrary, the interests in safeguarding federal benefits and programs have been held sufficient to sustain federal criminal penalties throughout this Nation's history, as *Hall*, *Westfall*, *Salinas*, and *Fischer* all make clear.

2. *Petitioner's conditional funding arguments are without merit*

Petitioner also claims that Section 666 transgresses the limits of the *Dole* factors in several respects. Because Section 666 is properly understood as a valid

exercise of Congress's power under the Necessary and Proper Clause, those arguments do not justify his position that Section 666 is facially unconstitutional. This Court's conditional funding decisions, including *Dole*, govern where Congress encourages or requires States to act in their sovereign capacity by conditioning the provision of federal funding on some undertaking by the States. In *Dole*, for example, the United States conditioned a portion of federal highway funds on the States' enactment of legislation that increased the drinking age to 21, a requirement that Congress could not, because of the 21st Amendment, impose itself. 483 U.S. at 209. In this case, the United States did not encourage or require state governments to regulate. Instead, Congress enacted federal legislation itself to serve the national government's own legitimate ends in protecting federal spending.

Even if viewed through the prism of conditional funding decisions like *Dole*, petitioner's arguments are mistaken.[12] He contends (Br. 32) that Section 666 is invalid under *Dole* because it is not "related to the purpose of the federal program." See *Dole*, 483 U.S. at 207 (condition may be "illegitimate" if "unrelated 'to the federal interest in particular national projects or programs'"). That claim is answered above, in the discussion of how Section 666 is plainly adapted to serve Spending Power interests under the Necessary

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[12] To the extent that petitioner relies on the Tenth Amendment as an independent theory, Br. 37, this Court recently declined to address "whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question." *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003); cf. *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 144 (1939).

and Proper Clause. See pp. 25-33, *supra*. Petitioner's basic premise (Br. 33-34) that each and every possible application of Section 666 must have a nexus to a federal interest misconceives *Dole*'s relatedness requirement. *Dole* mandates a "reasonable relationship" between the condition and the purpose of the funding, not a perfect fit in every conceivable application. See *New York* v. *United States*, 505 U.S. 144, 172 (1992) (spending conditions valid under *Dole* because they are "reasonably related to the purpose of the expenditure"); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").[13]

Petitioner's claim that Section 666 unconstitutionally coerces fund recipients is likewise without merit. This Court has suggested that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But the law has long "been guided by a robust common sense which assumes the freedom of the will as a working hypothesis." *Steward Machine Co.*, 301 U.S. at 590. Here, no government entity claims coercion, and petitioner offers no evidence that the United States exerted "a power akin to undue influence" to overcome the ordinarily "robust" presumption of free will. *Ibid.*

[13] In *South Dakota* v. *Dole*, for example, the Court did not require that every proscribed sip of beer by an underage drinker (such as one who is hiking in the mountains miles from a road) affect the safety of funded highways. Instead, it was sufficient that underage drinking, as a general matter, has a reasonable relationship to highway safety. 483 U.S. at 209-210.

A large financial inducement is not necessarily coercive. "In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If [the State or its citizenry] finds the [federal] requirements so disagreeable, [they are] ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." *Kansas* v. *United States*, 214 F.3d 1196, 1203 (10th Cir.), cert. denied, 531 U.S. 1035 (2000); see *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947); *Board of Educ.* v. *Mergens*, 496 U.S. 226, 241 (1990).

Petitioner's coercion theory also produces paradoxical results: the greater the federal benefits afforded to state, local, tribal, and private entities, the lesser the federal government's power to protect the integrity of its funds and programs. According to petitioner, because the price of declining to accept federal largesse is simply too great for a State (or, presumably, a local entity) to bear, Congress must make the funds available *without* putting in place federal means to protect the expenditures. Nothing in the Constitution, however, forbids Congress from affording protection commensurate with its legitimate expenditures.

III. Section 666 Is At Most Subject To As Applied Challenges

At bottom, petitioner's position is that "Section 666 is facially invalid because the conduct it covers does not *uniformly* have the requisite connection to federal spending, and no element within the offense requires the jury to find the necessary connection *in each specific case*." Br. 33 (emphases added). Petitioner posits the example of a Section 666 prosecution for the bribery of a parks department agent where the only federal benefits received by the governmental entity are for highway programs. Pet. 32. Such an observation does

not come close to establishing facial invalidity. As discussed above, Congress legitimately framed Section 666 to sweep broadly enough to eliminate barriers to the protection of federal funds and programs that had hampered the effectiveness of earlier statutes and reasonably concluded that significant corruption anywhere in an entity receiving the requisite federal funds is at least a potential threat to federal funds and programs. See pp. 30-36, *supra*. That justification establishes the constitutionality of Section 666 in *all* of its applications, even those that might be viewed in isolation as tangential or remote from the underlying purpose of Section 666.

In any event, the argument that some remote applications may be unconstitutional certainly cannot justify total invalidation of the statute on its face. This Court's cases, including *United States* v. *Salerno*, 481 U.S. 739 (1987), make that clear. See pp. 24-25, *supra*. Petitioner's contrary argument parallels the claim this Court rejected in *United States* v. *Raines*, 362 U.S. 17 (1960). In that case, the plaintiff challenged the Civil Rights Act of 1957 as facially unconstitutional because it purportedly reached some conduct—private discrimination—that was alleged to be beyond Congress's power to proscribe under the Fifteenth Amendment. 362 U.S. at 19-20. Although the Act on its face made no distinction between state action and private conduct, the Court held that purported defect insufficient to invalidate the statute in all its applications:

> [I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality. And as to the application of the statute called for by the complaint, * * * it is enough to say that the conduct charged * * * is certainly * * * 'state action' * * * subject to the ban of that Amendment, and that legislation designed to deal with such discrimination is "appropriate legislation" under it.

Id. at 24-25. The same reasoning applies here.[14]

This Court has suggested that facial invalidation may also be warranted where the statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover." *Raines*, 362 U.S. at 23; see also *Butts* v. *Merchants & Miners Transp. Co.*, 230 U.S. 126, 133 (1913) (law facially unconstitutional where Congress would not have intended "to make a law which should be applicable to a minor part of that jurisdiction and inapplicable to the major part"). In *Lopez* and *Morrison*, the Court did not remit defendants to as-applied challenges in order to preserve statutory applications that, because of a factual showing unrelated to the design of the statute, would have been constitutional. But this Court has found Section 666 to be constitutional in its core applications—the ones Congress most clearly intended to reach—as this Court's decisions upholding convictions under it attest. See *Salinas*, 522

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[14] Petitioner errs in arguing (Br. 34-35) that this case is analogous to the circumstances identified by Justice Scalia's dissenting opinion in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 731-732 (1995). Section 666 is not at all like a regulation that fails to include an element required by the statute. To the contrary, Section 666 has a jurisdictional element. Petitioner merely argues that the element is not sufficient to ensure the statute's constitutional application in each and every case. As *Raines* demonstrates, that concern is not enough to render Section 666 unconstitutional on its face.

U.S. at 60-61 (holding that "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts" there, and that "the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds"); *Fischer*, 529 U.S. at 681-682 (recognizing that the "Government has a legitimate and significant interest in prohibiting financial fraud or acts of bribery" given the threat to a federal "program's integrity" created there). The existence of a substantial body of such applications alone "is enough to defeat [the] assertion that the [law] is facially unconstitutional." *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

As a matter of prosecutorial discretion, the Department of Justice's policy is that "Federal prosecutors should be prepared to demonstrate that a violation of 18 U.S.C. § 666 affects a substantial and identifiable Federal interest before bringing charges," because "[t]his policy ensures that Federal prosecutions will occur only when significant Federal interests are involved." U.S. Attorney Manual § 9-46.110 (Sept. 1997). The adoption of such a policy as a matter of prosecutorial discretion suggests that there may be few cases brought to court in which the government's interest in applying Section 666 will not meet a federal nexus test.[15] Nevertheless, if it were thought constitutionally problematic to apply Section 666 in a particular case in which the federal interest that supports the statute cannot be concretely identified, even in a "highly attenuated" fashion, *United*

[15] The government's policy, of course, does not indicate that Congress was constitutionally precluded from casting a wider net to ensure adequate protection of federal interests, without entrusting to a jury potentially difficult proof issues in each case about the degree of a federal nexus.

States v. *Zwick*, 199 F.3d at 672, 687 (3d Cir. 1999), the correct constitutional solution would be to consider such a challenge on an as-applied basis. Any theoretical potential for unconstitutional applications provides no basis for facial invalidation.[16]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[16] Based on the concern that Section 666 might otherwise be unconstitutional, two courts have limited Section 666's application to situations where the offense conduct implicates a federal interest, although "a highly attenuated implication of a federal interest will suffice." *Zwick*, 199 F.3d at 687; *United States* v. *Foley*, 73 F.3d 484, 488-493 (2d Cir. 1996). That statutory-interpretation approach may differ from considering challenges to Section 666 on an as-applied basis, because a statutory nexus requirement would require a jury determination of that issue in every case. See *Brunshtein*, 344 F.3d at 98-99; cf. *Ring* v. *Arizona*, 536 U.S. 584, 606-607 (2002). In *Salinas*, this Court resolved the "constitutional as applied" issue itself. 522 U.S. at 60-61.

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Spending Clause of the United States Constitution, Article I, Section 8, Clause 1, provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

2. The Necessary and Proper Clause of the United States Constitution, Article I, Section 8, Clause 18, provides:

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Section 666 of Title 18, United States Code, provides:

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful

owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

(10)

No. 03-44

In the
Supreme Court of the United States

BASIM OMAR SABRI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Section 666(a)(2) of Title 18 is unconstitutional on its face because it imposes federal criminal regulation on local conduct that is unrelated to any exercise of Congress' power to spend money to "provide for the . . . general welfare." U.S. CONST. art. I, § 8, cl. 1.

As recently as its brief in the Court of Appeals below, the Government had contended that the Court's conditional spending cases authorized § 666. That position was incorrect, Pet. Br. 25-35, and the Government correctly abandons it. As the Government acknowledges, "[i]n this case, the United States did not encourage or require state governments to regulate. Instead, Congress enacted federal legislation itself . . . ." Resp. Br. 43.

The Government's new argument that § 666(a)(2) is justified by the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, does not free the statute from the limitations on the spending power, and it does not change the result of this case. § I.A. As the Court has long held, the Necessary and Proper Clause "is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned." *Kansas* v. *Colorado*, 206 U.S. 46, 88 (1907). When the Court has reviewed claims of authority under the Necessary and Proper Clause, it has therefore considered two questions: First, how attenuated is the connection between the regulation and the underlying grant of federal power? Second, how deeply does the regulation intrude into areas of traditional state authority? § I.A.1. When the connection to an enumerated power has been too attenuated, and the intrusion on state authority too deep, the Court has held the regulation unconstitutional, as it did most recently in *United*

States v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000). § I.A.2.

Judged under the Court's precedents, § 666(a)(2) is facially unconstitutional. § I.B. The statute claims a criminal regulatory power that lies at the extreme fringe of Congress' authority under the General Welfare Clause, if that power exists at all. § I.B.1. It acts in an area that by long tradition has belonged to the States and embraces a sweeping range of wholly local conduct. § I.B.2. And it imposes federal criminal liability on conduct that has only the most attenuated connection to federal spending, if there is any connection at all. To uphold § 666(a)(2), the Court would have to adopt an analysis that would undermine the enumeration of powers and open the door to a federal power to regulate for the general welfare. § I.B.3.

The Court has consistently held that it "may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the Legislature to enact, and thus save the statute from invalidity." *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 522 (1926). Section 666(a)(2) applies indiscriminately to local conduct that falls outside Congress' power to regulate. It is therefore unconstitutional on its face. § I.D.

ARGUMENT

I. Section 666(a)(2) Of Title 18 Exceeds Congress' Limited Powers Under Article I Of The Constitution.

Section 666(a)(2) of Title 18 is unconstitutional on its face because it imposes federal criminal regulation on local conduct that is unrelated to any exercise of Congress' power to spend money to "provide for the . . . general welfare." U.S. CONST. art. I, § 8, cl. 1.

A. When A Regulation Is Claimed To Be Necessary And Proper, The Court Judges Its Connection To The Underlying Granted Power And Its Disruption Of The Balance Of Federal And State Power.

Beginning in *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819), and continuing ever since, the Court has reserved for itself and exercised the authority to enforce the limits of federal power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18. As Chief Justice Marshall wrote, "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended." *Id.*, at 421. In each case, the Court asks the same question: Whether the connection between the regulation and the underlying grant of power is "so attenuated as to undermine the enumeration of powers set forth in Article I, § 8." *Jinks* v. *Richland County*, 538 U.S. 456, 123 S. Ct. 1667, 1672 (2003).

1. Congress' Discretion Does Not Shield § 666(a)(2) From Review.

The Government repeatedly argues that the Court should defer to Congress' judgment of the connection between § 666(a)(2) and the spending power. Resp. Br. 16-17, 46. It is true that Congress holds discretion in drafting federal law. But it does not follow "that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance." *Lopez*, 514 U.S., at 575 (Kennedy, J., concurring). Rather, "despite the breadth of the legislative discretion, our duty to hear and to render judgment remains." *United States* v. *Butler*, 297 U.S. 1, 67 (1936).

In both *Lopez* and *Morrison*, the Government invoked the Necessary and Proper Clause. *See* Brief of

the United States in No. 93-1260, pp. 2, 12-13; Reply Brief in No. 93-1260, p. 15; Brief of the United States in Nos. 99-5, 99-29, p. 21. Yet in both cases, the Court reasserted its duty and authority to judge the claimed relationship to a federal power. "'[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" *Morrison*, 529 U.S., at 614 (quoting *Lopez*, 514 U.S., at 557, n.2) (internal quotation marks omitted). As Justice Kennedy explained in his concurring opinion in *Lopez*, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." 514 U.S., at 578.

2. The Court Has Consistently Struck Down Statutes Regulating Conduct That Lacks A Nexus To A Granted Federal Power.

In judging whether the Federal Government has tipped the scales of power too far, the Court examines the balance from both sides. First, it inquires how far the federal regulation strays from the granted federal power. Second, it considers how deeply the regulation intrudes into areas of traditional state authority. The ultimate question is whether the regulation "undermine[s] the enumeration of powers set forth in Article I, § 8." *Jinks*, 123 S.Ct., at 1672. If it does that, it is unconstitutional.

This analysis is not of recent origin. The Court applied it, and struck down a statute, in *United States* v. *Fox*, 5 Otto (95 U.S.) 670 (1878). There, the statute prohibited fraudulently acquiring goods on credit

within three months of bankruptcy. Although the Government argued that the statute was necessary and proper to implement Congress' power to regulate bankruptcies, the Court nonetheless held the statute unconstitutional. First, the regulation's connection to the federal power was too attenuated, because "[h]ere an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken . . . ." *Id.*, at 672. Second, the statute intruded deeply into traditional state authority over criminal law: "[A]n act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress . . . ." *Ibid.*

More than one hundred years later, the Court took the same approach to the constitutional questions in *Lopez* and *Morrison*. Both times, the Court examined the claimed connection to a federal power and compared it to the intrusion on areas of traditional state control. And both times, the Court held the statute unconstitutional because of the threat it posed to federalism by undermining the enumeration of powers. Pet. Br. 32-34. In *Lopez*, the Court struck the statute down because the defined offense of possessing a firearm within 1,000 feet of a school zone bore only an attenuated relationship to the asserted source of power under the Commerce Clause, and the statute also intruded deeply into the States' traditional authority over criminal law. *Lopez*, 514 U.S., at 561, n.3, 566-67. In *Morrison*, the Court held the statute unconstitutional because the defined offense of committing a crime of violence motivated by gender likewise bore only an attenuated relationship to the

Commerce Clause, and it too upset the balance of federal and state power. *Morrison*, 529 U.S., at 617-19.

The Government is thus incorrect to suggest that principles of federalism matter to the constitutional analysis only when the federal statute conscripts state officials or infringes on a State's sovereign immunity. Resp. Br. 39-40. It is true that state sovereignty alone is at times sufficient to repel federal power. Pet. Br. 37-40 (citing *Alden* v. *Maine*, 527 U.S. 706, 732 (1999); *Printz* v. *United States*, 521 U.S. 898, 923 (1997)). But principles of federalism do not cease to be relevant, whenever they are not sufficient alone. The Court's decisions in *Fox*, *Lopez*, and *Morrison* all stand for the proposition that, in judging whether a regulation exceeds Congress' enumerated powers, the Court may appropriately consider the effect the regulation has on the balance of federalism that the enumeration is intended to protect. Pet. Br. 35-37.

B. Measured Under The Court's Precedents, § 666(a)(2) Is Unconstitutional.

Section 666(a)(2) suffers from the same defects that afflicted the statutes held unconstitutional in *Fox*, *Lopez*, and *Morrison*, but to a greater degree. It is therefore unconstitutional.

1. The Power To Regulate Exists, If At All, Only On The Extreme Fringe Of Congress' Authority Under The Spending Power.

First, the Government correctly argues that this case is different from *Lopez* and *Morrison* because "[t]his case does not involve an exercise of Congress's power to enact criminal laws to effectuate a specific enumerated grant of regulatory authority." Resp. Br. 36. But the argument favors Petitioner. Whereas the power to regulate falls within the core of the enumerated powers, it exists, if at all, only on the

extreme fringe of Congress' authority to spend money to provide for the general welfare. Pet. Br. 12-14.

The history of the Court's spending power precedents is a history of limiting Congress' power to condition grants of spending, so as to tie that authority to the core power of appropriating money and prevent it from becoming a power to regulate for the general welfare. In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), for example, the Court stated that a condition must be reasonably related to the federal spending, which ensures that Congress is specifying how funds should be spent and not using federal money as a civil fine to force state officials to implement a federal regulatory scheme. *Cf. Printz*, *supra*. The requirement that the amount of money at stake not be so large as to be coercive is likewise intended to flush out federal regulation (backed by civil fines) disguised as conditional spending. Pet. Br. 31-34.[1] And the requirement of *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), that conditions be stated unambiguously, is derived directly from the fact that the power to spend is not a power to regulate. In *Pennhurst*, the Court held that Congress had not elected to forcibly regulate under the Fourteenth Amendment. *Id.*, at 16-17. Then, turning to the spending power, the Court declared that "*[u]nlike* legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract," and therefore "[t]he legitimacy of

[1] The paradox the Government sees in Petitioner's coercion argument (Resp. Br. 45) does not exist. If a condition extends only as far as the federal money, funding recipients may give up small portions of their federal money to free small portions of their employees from federal regulation. The coerciveness of § 666 is that it requires a funding recipient to reject *all* of its federal funding to free *any* of its agents from federal criminal authority. The all-or-nothing choice betrays § 666 as an unduly coercive exercise of regulatory power.

Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.*, at 17 (emphasis added).

As often as it has been advanced, the argument that the Government may regulate directly under the spending power has been rejected. Pet. Br. 11-14. "The proposition, often advanced and as often discredited, . . . that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, [has] never been accepted but always definitely rejected by this court." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291 (1936). In *Butler*, the Court struck down a spending-power statute precisely because Congress, in a claimed exercise of the authority to condition spending, had strayed too far into direct regulation. 297 U.S., at 73-75. Had it not rejected the claim, the Court worried that it risked authorizing a general police power: "If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states." *Id.*, at 75; *see also Dole*, 483 U.S., at 217 (O'Connor, J., dissenting) (*Butler*'s "discussion of the spending power and its description of both the power's breadth and its limitations remain sound").

Section 666(a)(2) lies even farther from the core of the spending power than the statutes that the Court has struck down, claiming criminal regulatory authority over conduct that has only the most tenuous connection to any federal spending. The Court has never recognized that expansive authority, and the five decisions of the Court that the Government cites in its

support do not hold to the contrary. Resp. Br. 25-28, 34-35, 42.

Two of the five decisions addressed only issues of statutory interpretation. *See Fischer* v. *United States*, 529 U.S. 667 (2000); *Dixson* v. *United States*, 465 U.S. 482 (1984). Neither of those cases addressed the scope of Congress' authority to regulate under the spending power, and "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas* v. *Cobb*, 532 U.S. 162, 169 (2001). Moreover, to the extent that implications about the constitutionality of § 666(a)(2) can be drawn from either decision, they support Petitioner. In *Fischer*, the Court agreed that turning "almost every act of fraud or bribery into a federal offense [would] upset[] the proper federal balance." 529 U.S., at 681.[2] Justice Thomas in dissent stated even more plainly the constitutional defect: "Without a jurisdictional provision that would ensure that in *each* case the exercise of federal power is related to the federal interest in a federal program, § 666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would upset the proper federal balance." *Id*, at 689, n.3 (internal quotation marks omitted). In *Dixson*, the Court was careful to explain that it would not interpret the criminal statute before it, 18 U.S.C. § 201, to apply indiscriminately to individuals who had no connection to a federal program, saying, "[W]e do not mean to suggest that the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of" § 201. 465 U.S., at 499. And Justice O'Connor's

[2] The *Fischer* Court did not have to grapple with the effect of this conclusion on the facial constitutionality of § 666(a)(2), because as the Government stated in its brief in *Fischer*, "This case does not present the question whether federal funds must be linked to the conduct prohibited by Section 666." Br. for Respondent in No. 99-116, p. 32.

dissenting opinion, in which then-Justice Rehnquist and Justice Stevens joined, anticipated the constitutional concerns that are presented in this case, warning that applying federal criminal statutes to local governments "raises problems of autonomy and federalism." *Id.*, at 511.

Three of the decisions cited by the Government did sustain federal criminal statutes against constitutional challenge, but in none of them did the Court hold that the source of the federal authority was a bare exercise of the spending power. First, in *United States* v. *Hall*, 8 Otto (98 U.S.) 343 (1878), the Court sustained a statute making it a criminal offense for a guardian to embezzle a soldier's federal pension. But the Court based Congress' authority on its regulatory power over the military, saying that "[e]ven the respondent admits that Congress may . . . raise and support armies." *Id.*, at 351. In addition, the Court considered the pensioners "wards of the United States," *id.*, at 353, something that cannot be said of the governments to which § 666(a)(2) applies, *see* Pet. Br. 28-29.

Second, in *Westfall* v. *United States*, 274 U.S. 256 (1927), the Court upheld a federal statute making it a criminal offense to commit acts of fraud against banks in the federal reserve system. But again the Court did not invoke the spending power. Instead, the Court referred to the banks as "instrumentalities of the United States," *id.*, at 259, and invoked Congress' power under the Commerce Clause, *ibid.*, which undoubtedly reaches banks in the federal reserve system.

The Government's strongest authority is the Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), in which the Court stated in dictum that a different subpart of § 666 that Petitioner does not challenge—§ 666(a)(1)(B), not § 666(a)(2)—"did not extend federal

power beyond its proper bounds." 522 U.S., at 61. *Salinas* is distinguishable because it involved a different subpart, but more importantly it is distinguishable because it addressed a different type of question. *Salinas* arose on appeal after a conviction, where a court can conduct harmless error review based on its own examination of the factual record. FED. R. CRIM. P. 52(a). That is what *Salinas* effectively did. Although the jury had not been required to find that the alleged corruption had a connection to a federal power, the Court was able to conclude on its own analysis that any error in that regard was harmless. The defendant had accepted a bribe to influence his duties in housing a federal prisoner, and that directly affected the Government's ability to enforce its legitimately imposed punishment. *Salinas*, 522 U.S., at 61; *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999) (failure to submit element to jury may be harmless). This case, by contrast, arises not after conviction, but on appeal from the district court's dismissal of the indictment. The question presented is not whether any error is harmless, but whether a facial constitutional error exists because § 666(a)(2) applies generally to local conduct that has no connection to any federal spending, without requiring the jury to find a connection in each specific case. *Salinas* did not resolve that question. Indeed, the Court devoted only four sentences to the constitutional issue, and it did not cite the General Welfare Clause. Rather, the Court cited *Westfall*, which, as Petitioner has explained, rested on the Commerce Clause and Congress' authority to protect instrumentalities of the Federal Government.

The Court has never recognized the power to regulate under the General Welfare Clause that the Government seeks here. At the outset, then, the

burden of justifying § 666(a)(2) is heightened, because if the authority to enact such a law does not fall outside the spending power entirely, it lies at the power's extreme fringe.

2. Section 666(a)(2) Intrudes Deeply Into State Authority Over Criminal Law.

Section 666(a)(2) also intrudes deeply into traditional state authority over criminal law. The Government concedes § 666(a)(2)'s scope in the section of its brief addressing statutory interpretation, yet attempts to obscure it in the section defending the statute's constitutionality. There, the Government repeatedly states that the statute applies to *agencies* that receive federal funding.[3] But it is simply not correct that § 666 applies only to the particular agencies that receive federal funds. Rather, when any portion of an organization, government, *or* agency receives the requisite $10,000 in federal funds, the statute applies to "the covered 'organization, government, *or* agency'" as a whole. Resp. Br. 18-19 (quoting *Salinas*, 522 U.S., at 57) (emphasis added). All of a government's or organization's agents become subject to the statute, regardless whether they have any connection to the federal program. Pet. Br. 17-24.

Even more importantly, the section of the statute that Petitioner is challenging, § 666(a)(2), applies to all of the private citizens who attempt to influence any agent of the covered governments or organizations. That section consequently has an extraordinary reach.

[3] *See, e.g.*, Resp. Br. 12 (the statute's "requirements limit Section 666 to significant acts of corruption where, because the relevant *agency* receives the requisite federal benefits, there is a strong federal interest . . . .") (emphasis added); *id.*, at 13 ("Section 666 is closely tied to the United States' strong interest in guarding against the threat to its funds and programs created by financial corruption in the *agencies* that administer them.") (emphasis added); *id.*, at 32, 33, 39.

The governors, representatives, and senators of every state are subject to § 666. Pet. Br. 18. Thus, if a local person offers a bribe to a state representative, the Government asserts a federal criminal interest through § 666(a)(2). It does not matter what the subject matter is, or whether it has any connection to a federal program. It does not matter even if the offer is refused. Likewise, every employee of every private organization that receives $10,000 in federal benefits within a one-year period is subject to § 666. For example, between 1995 and 1997, General Electric, one of the world's largest corporations, received $542,000 in federal benefits under the Department of Commerce's Advanced Technology Program. 15 U.S.C. § 278n; http://www.atp.nist.gov (visited on 2/12/04). By virtue of that grant, all of GE's employees fell within § 666, and every person who attempted to influence any of those employees regarding a transaction valued at $5,000 or more fell within § 666(a)(2).

It is difficult to comprehend, let alone describe, the variety and magnitude of local, private conduct over which § 666(a)(2) asserts federal criminal jurisdiction. The Government frankly admits that § 666(a)(2) reaches too far by attempting to supplement the statute with its prosecutorial discretion. Resp. Br. 48. The limits of federal power, however, do not depend on a federal prosecutor's discretion. And here, the Government concedes that, discretion notwithstanding, it may bring cases "in which the government's interest in applying Section 666 will not meet a federal nexus test." *Ibid.* To say that § 666(a)(2) "effects a change in the sensitive relation between federal and state criminal jurisdiction," *Lopez*, 514 U.S., at 561, n.3 (quotation marks omitted), does not adequately capture the statute's intrusion on state authority. Section 666(a)(2) "upsets the federal balance to a degree that

renders it an unconstitutional assertion" of federal power. *Id.*, at 580 (Kennedy, J., concurring).

3. The Rationales Advanced To Justify § 666(a)(2) Threaten To Undermine The Enumeration Of Powers.

Because § 666(a)(2) applies to private conduct that has no apparent connection to federal spending, Pet. Br. 16-18, 32; *supra* § I.A.2, the rationales that the Government must advance to justify it would equally justify regulation of "all activities that may affect the success of federally funded programs." Resp. Br. 38.

The Government offers two rationales to connect the conduct regulated by § 666(a)(2) to a federal interest. First, it argues, corruption in an unrelated part of an organization or government may lead to corruption in federally-funded programs. Resp. Br. 31-32. Second, it argues, because money is fungible, an effect on any part of a government's or organization's finances can "place additional burdens on federal funded programs, impairing their achievement of federal program goals." Resp. Br. 33.

These rationales are equally as attenuated as the "costs of crime" logic that the Court rightly rejected in *Morrison* and *Lopez*, and, like that logic, they "would bid fair to convert congressional authority under [the one power] to a general police power of the sort retained by the States." *Lopez*, 514 U.S., at 567; *see* Pet. Br. 32-35. If Congress may regulate offers of bribes made to agents unconnected to any federal program because of the effect those offers may have on the beneficiary's finances, then it may regulate unconnected theft from beneficiaries as well—because that would also "drain commingled resources from or place additional burdens on federal funded programs, impairing their achievement of federal program goals."

Resp. Br. 33. And if the Government may enact criminal regulation to guard against a "potential threat to federal funds and programs," Resp. Br. 46, surely it may take the lesser step of enacting civil regulation to protect against potential, and real, threats as well. Under the Government's rationale, Congress could thus enact a federal law of contract, of unjust enrichment, of conversion, fraud, promissory estoppel, tortious inference with contract, and the whole host of other bodies of common law that till now have been thought the traditional province of the States.

The Government ultimately admits that its defense of § 666(a)(2) rests on the asserted authority to "polic[e] the integrity of the entities to which its funds and programs are entrusted." Resp. Br. 38. In truth, § 666(a)(2) extends beyond that to police the integrity of anyone who interacts with any agent of a federally funded entity. The Court has never held that Congress possesses that authority, and for good reason. "'[T]he principle that the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *Morrison*, 529 U.S., at 618, n.8 (quoting *New York* v. *United States*, 505 U.S. 144, 155 (1992)) (internal quotation marks omitted). Accepting the Government's rationale would place the Court, not at the top of a slope leading to a generalized police power, but at its bottom.

C. The Government's Asserted Need To Suppress Corruption Cannot Justify § 666(a)(2).

The Government asserts that it will be left "toothless" if the Court sustains Petitioner's challenge to § 666(a)(2). For three reasons, this assertion does not justify the statute.

First, the assertion addresses the wrong point. "The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards . . . ." *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). As the Court stated in *New York*, it is not sufficient that there be a legitimate interest, there must be a granted power: "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." 505 U.S., at 187. Thus, although Petitioner does not doubt the interest in reducing corruption, it is nonetheless true that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S., at 607. For statutes based on the spending power, federal funding is not a "happenstance," Resp. Br. 21, it is the only basis for federal authority. Section 666(a)(2) is not sufficiently connected to Congress' power to spend for the general welfare to justify its intrusion into traditional State authority over criminal law, and it is therefore unconstitutional.

In addition, the Government fails to supply any evidence for the claimed necessity of § 666(a)(2). Congressional findings may help the Court to judge whether conduct "substantially affect[s]" a granted federal power "even though no such substantial effect [is] visible to the naked eye." *Lopez*, 514 U.S., at 563. But no findings support § 666(a)(2). The passage from the Senate report that the Government cites (Resp. Br. 3-4) do not contain findings, just declarations. Moreover, the necessity the report claims is limited to

corruption within federally funded programs. The report does not claim the need to reach outside those programs, as § 666(a)(2) does. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 369-70, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11. Finally, the claimed necessity was predicated on a supposed gap in the law created by lower courts' interpretations of 18 U.S.C. § 201, an interpretation that the Government acknowledges was reversed by the Court's decision in *Dixson*, shortly after § 666 was enacted. The legislative record does not support the asserted necessity for § 666(a)(2).

Ruling for Petitioner also will not call forth the horribles that the Government recites. Resp. Br. 37-38, 41-42. Petitioner has conceded that the Government may protect its own institutions and property, and that if the mail and wire fraud statutes capture corrupt conduct within the Commerce Clause, the Government may enforce them. Pet. Br. 27-28, 30. Petitioner has conceded as well the Government's authority under the spending power to require funding recipients to consent to be subject to private suits for damages. Pet. Br. 29-30. And although the Government embraces the Court of Appeals' mistrust of state officials, Resp. Br. 37-38, the laws of every State address corruption as well, Pet. Br. 29, and "[a]s public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities." *Frew* v. *Hawkins*, 124 S.Ct. 899, 906 (2004). There is no need for the Court to extend the spending power beyond its limits to affirm § 666(a)(2), when the federal and state governments can address their interest in so many other, legitimate ways.

D. Petitioner's Challenge To § 666(a)(2) Is Properly A Facial Challenge.

The Court has consistently analyzed challenges to Congress' power to enact general criminal statutes as facial challenges, and it has struck down unconstitutional statutes on their face. The three primary cases Petitioner discussed above—*Fox*, *Lopez*, and *Morrison*—each held a statute facially unconstitutional. In addition, *see United States* v. *Reese*, 92 U.S. 214, 221 (1876); *Butts* v. *Merchants & Miners Transp. Co.*, 230 U.S. 126 (1913). In *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 522 (1926), the Court explained that "we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the Legislature to enact, and thus save the statute from invalidity."

The Government has at times expressly requested the Court to allow it to enforce a general statute against the portions of the covered conduct that fall within Congress' powers, but the Court has refused:

> It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes should be held valid in that class of cases, if no further. . . . [But] it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

Trade-Mark Cases, 100 U.S. 82, 98 (1879). *See also United States* v. *Darby*, 312 U.S. 100, 120-21 (1941).

The Government agrees that the Court cannot interpret § 666(a)(2) to contain a nexus element. Pet. Br. 20-24; Resp. Br. 18-19, 22. But its invitation to conduct as-applied challenges to the statute, Resp. Br. 15, 45-48, would reach the same result, as the cases just discussed have all recognized. As-applied challenges would *de facto* add the nexus element that Congress rejected by requiring a factfinder in every case to find something more than the statute requires. Moreover, it would improperly substitute a judicial factfinder for the jury that the Constitution requires. *See Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000); *United States* v. *Brunshtein*, 344 F.3d 91, 99 (CA2 2003) (if § 666 requires proof of a nexus, a jury must find it). That is something the Court has long refused to allow, because "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Reese*, 92 U.S., at 221.

The Court's many decisions sustaining facial challenges to Congress' power to enact criminal statutes are not inconsistent with its decisions in *United States* v. *Raines*, 362 U.S. 17 (1960), and *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), as the Government implies. Resp. Br. 46-47. *Raines* reviewed a civil statute, so it did not implicate the Sixth Amendment right to have a jury find all the facts necessary for conviction. Indeed, it expressly distinguished the criminal cases such as *Reese* on which Petitioner relies. *Raines*, 362 U.S., at 23; *see also Butts*, 230 U.S., at 137 (distinguishing challenge to civil statute). In *Salerno*, the Court addressed a statute regulating pre-trial detention that also did not implicate the Sixth Amendment. In addition, Congress undisputedly had power to enact that statute, and the

only question was whether in some instances its application conflicted with an independent constitutional right. *Salerno*, 481 U.S., at 746. That is a different type of challenge than the challenge to Congress' power presented in this case, for two reasons. First, the question of whether a statute violates an independent right is not a question that *Apprendi* or any other case requires to be decided by a jury. Second, because the Court's only authority is to enforce the constitutional right, it ordinarily has no power to declare the statute void in general, only where it conflicts with the right. *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 178 (1803).

When the challenge is to Congress' power to pass the statute, the analysis is different. As explained above, the Court's task then is to decide whether the statute applies to a body of conduct that categorically falls within federal power, or else contains an element requiring the jury to find the necessary connection. If the statute fails those tests, it is unconstitutional in every application and is therefore facially invalid. *See* Pet. Br. 34-35 (quoting *Babbitt* v. *Sweet Home Chapter of Cmty. for a Great Ore.*, 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting)). That is § 666(a)(2)'s failing.

CONCLUSION

The Court should hold that 18 U.S.C. § 666(a)(2) is unconstitutional on its face.

Respectfully submitted,

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Supreme Court of the United States

BASIM O. SABRI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 03-44

BASIM O. SABRI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the United States Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the

[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Clerk. No counsel for any of the parties authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and thus is of central concern to Cato and the Center.

SUMMARY OF ARGUMENT

Section 666(a)(2) of Title 18 asserts federal criminal jurisdiction over bribery or attempted bribery based solely on the target's status as an agent of a federally-assisted entity. Such a statute is not an appropriation law or a condition on an appropriation. It must be justified, if at all, as a law "necessary and proper for carrying into Execution" some federal power, such as the appropriation power. Section 666(a)(2), however, is neither "necessary" nor "proper" for executing any federal power.

For a law under the Necessary and Proper Clause to be "necessary," it must possess, as James Madison explained more than two centuries ago, a direct, obvious, and precise connection to permissible governmental ends. The Eighth Circuit wrongly concluded that Section 666(a)(2) need only be rationally related to a permissible end. That conclusion is manifestly inconsistent with the Constitution's text and history.

Textually, the word "necessary," as defined by dictionaries from the eighteenth century to the present, cannot linguistically support a rational basis test. Intratextually, interpreting "necessary" as "rationally related" makes nonsense of the Imposts Clause of Article I, section 10; and a study of the Constitution's uses of the synonyms "necessary" and "needful" demonstrates that "necessary" is used when a more rather than a less demanding standard for matching means to ends is intended. Furthermore, this Court has recently held that an administrative agency's broad construction of the

word "necessary" in a statute was unreasonable under the second step of the *Chevron* doctrine; it is similarly unreasonable to read the word "necessary" in the Necessary and Proper Clause to embody merely a rational basis standard.

Historically, the Necessary and Proper Clause was represented to the ratifying public as a clarification of powers that would otherwise exist by implication. One could not imply, in a Constitution that enumerates governmental powers, a legislative power to pass any implementing laws that are "rationally related" to permissible ends.

The Eighth Circuit's rational basis standard for necessity is inconsistent with the test articulated and applied by the Court in *McCulloch v. Maryland*, which emphasized that necessary laws must be at least "plainly adapted" to permissible governmental ends. Subsequent cases have on occasion misrepresented this standard as a rational basis test, though other cases have hewed closer to the correct constitutional standard. To the extent that any statements in this Court's opinions support the idea that "necessary" means "rationally related," they depart so dramatically from the meaning of the Constitution that they should be qualified or disavowed.

The correct constitutional rule for necessity under the Necessary and Proper Clause was articulated by James Madison: laws executing federal powers must have a "definite connection" to and "some obvious and precise affinity" with permissible governmental ends. This standard makes sense textually, structurally, and historically, and to the extent that statements in prior opinions are deemed to foreclose its application, those statements should be qualified or disavowed.

Section 666(a)(2) plainly fails this test. If the statute is construed to contain no requirement that the attempted bribe concern the administration of a federally funded program, the

statute simply polices the honesty of people who happen to deal with agents of recipients of federal financial assistance. There is no direct, obvious, or precise connection to the execution of any federal power. This falls far short of the constitutional requirements of the Necessary and Proper Clause.

Even if Section 666(a)(2) were somehow deemed "necessary," it would not be "proper" for carrying into execution federal powers. A law pursuant to the Necessary and Proper Clause can fail to be "proper" if it violates constitutional principles of federalism, separation of powers, or individual rights. The Eighth Circuit was wrong to limit the reach of the word "proper" only to laws that directly regulate the States as States; that is one form of constitutional impropriety, but hardly the only one. Section 666(a)(2) extends federal criminal jurisdiction far beyond the "proper" sphere of federal authority and is accordingly unconstitutional.

ARGUMENT

I. SECTION 666(a)(2) IS A PURPORTED EXERCISE OF POWER UNDER THE NECESSARY AND PROPER CLAUSE

Section 666(a)(2) of Title 18 seeks to punish criminally anyone who

> corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

18 U.S.C. § 666(a)(2) (2000), provided that "the organization, government, or agency receives, in any one year period, [federal] benefits in excess of $10,000 . . . ." *Id.* § 666(b). Section 666(a)(2) is not an appropriation law. It does not

direct the payment of federal funds or other federal benefits to any person or entity. Nor is it a condition on an appropriation. It does not direct recipients of federal benefits to take or refrain from any action. No agreement, tacit or express, by entities that receive federal benefits can explain or justify the extension of federal criminal liability to nonrecipients who merely transact with those entities. On this point, the decision below was entirely correct. See *United States v. Sabri*, 326 F.3d 937, 945-48 (8th Cir. 2003).

Accordingly, Section 666(a)(2) cannot be constitutionally justified as an exercise of Congress's appropriations power. It must instead be defended as a means "necessary and proper for carrying into Execution" some enumerated federal power. U.S. Const. art. I, § 8, cl. 18. This case thus turns on the scope of Congress's power under the Necessary and Proper Clause.

A careful focus on the scope and limits of the Necessary and Proper Clause is especially crucial in this case, because the decision below, and other similar decisions, see, e.g., *United States v. Edgar*, 304 F.3d 1320, 1325 (11th Cir. 2002), identify the federal spending power as the power carried into execution by Section 666(a)(2). And while the reach of the spending power is not presently at issue, it is worth noting in this context that the source and scope of the federal spending power have strayed far from their constitutional roots. Since the mid-1930s, Congress's spending power has generally been attributed to the first clause in article I, section 8, which grants Congress power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. See *United States v. Butler*, 297 U.S. 1, 64-66, 78 (1936); *Helvering v. Davis*, 301 U.S. 619, 640 (1937). That attribu-

tion is clearly wrong; Congress's authority to appropriate money comes from the Necessary and Proper Clause.[2] The

[2] The Taxing Clause of Article I grants Congress the power to lay and collect taxes, duties, imposts, and excises. That is the only power granted by the clause; everything else in the clause explains, clarifies, or qualifies that grant of the taxing power. It is obvious how the uniformity provision at the end of the clause qualifies the taxing power. The language "to pay the Debts and provide for the common Defence and general Welfare of the United States" that immediately follows the grant of the taxing power serves two basic functions (other than assuring a populace suspicious of taxes that federal taxes will only be levied for good cause). First the reference to the "general Welfare" as a permissible purpose of taxation makes clear that taxes may be levied for appropriate regulatory purposes and not merely to raise revenue—a subject that was of special importance to the founding generation. See Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 John Marshall L Rev 81, 87 (1999) Second, the qualifying language may guard against inappropriate regulatory uses of the taxing power, such as imposition of a formally "uniform" excise tax on goods that are produced or used only in one disfavored region or state. In no event does any of this language in the Taxing Clause grant any power to Congress—to spend for the general welfare or otherwise.

Nor can one *infer* a power to spend for the general welfare (or for any other purpose) from the Taxing Clause. Taxes are not the federal government's only source of revenue. Money can also be raised by borrowing or by selling land or other property. See U.S. Const. art. I, § 8, cl. 2 (granting power "[t]o borrow Money on the credit of the United States"); *id.* art. IV, § 3, cl. 2 (granting power "to dispose of . . . the Territory or other Property belonging to the United States"). The Borrowing Clause and Territories Clause contain no language referring to debts, the common defense, or the general welfare. Does that mean that borrowed funds or proceeds from land sales cannot be spent—or can only be spent for different purposes than funds raised through taxation? If the language in the Taxing Clause truly generates spending authority, these absurd conclusions are difficult to avoid. See Charles Warren, *Congress As Santa Claus: or National Donations and the General Welfare Clause of the Constitution* 28-29 (1932). Such a strained inference is not necessary

constitutional location of the spending power has important consequences: if appropriations laws can be authorized only by the Necessary and Proper Clause, then such laws must be "necessary and proper for carrying into Execution" federal powers, and the federal government may spend only in furtherance of enumerated constitutional powers rather than for the "general Welfare of the United States."

Modern law, of course, is to the contrary; Congress is presently permitted to spend without tying that spending to any enumerated power. It is therefore crucial to respect the limits on Congress's authority under the Necessary and Proper Clause, especially when that power is invoked in aid of the spending power. An overbroad construction of the Necessary and Proper Clause superimposed upon the modern spending power poses grave constitutional danger.

II. SECTION 666(a)(2) IS NOT "NECESSARY ... FOR CARRYING INTO EXECUTION" ANY FEDERAL POWER

The Eighth Circuit determined that Section 666(a)(2) was "necessary" for carrying into execution the federal power to spend money because the statute's anti-bribery provisions were "rationally related . . . to achieving Congress's end" of effectuating its spending programs. 326 F.2d at 949. See also *id.* at 950, 951. That conclusion reflects a profound misunderstanding of the constitutional standard for evaluating laws under the Necessary and Proper Clause. As James Madison explained more than two centuries ago, a "necessary" law must have a definite, obvious, and precise

to provide Congress with a spending power; the Necessary and Proper Clause does the job nicely.

As an eighteenth-century Freudian might have said: sometimes a power to lay and collect taxes really is just a power to lay and collect taxes.

connection to permissible governmental ends. Section 666(a)(2) plainly fails this test.

A. The Word "Necessary" Requires More than a Rational Relationship Between Means and Ends

The Necessary and Proper Clause authorizes Congress "[t]o make . . . all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the State of Maryland argued that a law could only be "necessary" within the meaning of this clause if it was "indispensably requisite," *id.* at 367 (argument of Mr. Jones), to the effectuation of some enumerated power—or, in the words of Thomas Jefferson, if it represented "means without which the grant of the power would be nugatory." Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *in* 19 *The Papers of Thomas Jefferson* 275, 278 (Julian P. Boyd ed., 1974). This definition of the word "necessary" was echoed by other members of the founding generation, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Penn. J. Const. L. 183, 188-96 (2003) (forthcoming); and it conforms elegantly to the meanings reported in Samuel Johnson's then-contemporary *Dictionary of the English Language*, which in both the 1755 and 1785 editions defined "necessary" as "1. Needful; indispensably requisite. 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence." That linguistic understanding of "necessary" has continued into modern times. See 7 *Oxford English Dictionary* 60-61 (1933) (defining "necessary" as "Indispensable, requisite, essential, needful; that cannot be done without" and "closely related or connected; intimate").

Nonetheless, the Court's opinion by Chief Justice Marshall in *McCulloch* famously rejected such a strict view of "necessary." The Court relied on several considerations to reach this conclusion, but the most powerful argument was the intratextual comparison of the Necessary and Proper Clause with the Imposts Clause of Article I, section 10. The Imposts Clause forbids a State from laying import or export duties without congressional consent "except what may be *absolutely necessary* for executing its inspection laws," U.S. Const. art. I, § 10, cl. 2 (emphasis added). The pairing of "necessary" with the qualifier "absolutely" supports the view that the unqualified word "necessary" in the Necessary and Proper Clause means something less restrictive than "those single means, without which the end would be entirely unattainable." 17 U.S. (4 Wheat.), at 414.

But even if a law can be "necessary . . . for carrying into Execution" a federal power without being absolutely indispensable for effectuating that power, that does not entail, or even point toward, the Eighth Circuit's view that a law is constitutional under the Necessary and Proper Clause if it is "rationally related . . . to achieving Congress's ends." It is evident that the Eighth Circuit meant by "rationally related" the kind of minimal means-ends connection required by this Court's decisions applying rational basis scrutiny under the Equal Protection Clause. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). That understanding of the Necessary and Proper Clause is simply indefensible as a matter of text and history and misreads the test set forth in *McCulloch*.

1. *The Eighth Circuit's "Rationally Related" Standard for Determining Necessity Has No Basis in the Constitution's Text*

Textually, while the word "necessary" in the Necessary and Proper Clause might mean something less than "indispensable," it surely means more than "rationally related." Each of the definitions of "necessary" found in Samuel

Johnson's eighteenth-century dictionary reflects a far stricter understanding of the term than a mere rational relationship between means and ends. That may not be enough to establish that the State of Maryland's interpretation of the Necessary and Proper Clause was correct, but it is more than enough to show that the Eighth Circuit's "rationally related" interpretation is wrong.

This conclusion is strongly reinforced by several intratextual comparisons within the Constitution. First, consider what happens if one plugs the Eighth Circuit's understanding of "necessary" into the Imposts Clause: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely [rationally related to] executing its inspection Laws." The qualifier "absolutely" is nonsensical on such an interpretation. In order for the Imposts Clause to make sense, the word "necessary" must describe a direct and substantial connection between means and ends, with the word "absolutely" *amplifying* but not changing the basic character of that connection.

Second, the Constitution's uses of the words "necessary" and "needful" are also instructive. Samuel Johnson cross-defined "necessary" and "needful" as synonyms: one of Johnson's definitions of "necessary" was "needful," and Johnson's entire definition of "needful" was simply "necessary; indispensably requisite." On two separate occasions, including the clause immediately preceding the Necessary and Proper Clause, the Constitution uses the term "needful" to define Congress's powers. See U.S. Const. art. I, § 8, cl. 17 (giving Congress power of exclusive legislation over all land acquired from States "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"); *id.* art. IV, § 3, cl. 2 (authorizing Congress to make "all needful Rules and Regulations respecting" federal territory or property). Both usages of "needful" involve

contexts—federal enclaves and federal territory—in which Congress acts with the powers of a general government. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) (Congress has "general and plenary" power over federal territories). If there was ever going to be occasion for giving terms such as "needful" or "necessary" a relatively loose construction, would it be when defining the legislative powers of a general government or the legislative powers of a limited government? The answer is obviously the former, which indicates that the Constitution uses "needful" when describing a less demanding means-ends requirement and "necessary" when describing a stricter one. Again, this may not be enough to sustain the view that "necessary" means "indispensable," but it certainly defeats the claim that "necessary" means "rationally related."

Finally, this Court recently acknowledged in another context that the ordinary meaning of the word "necessary" entails more than a rational basis standard. Under the Telecommunications Act of 1996, when market entrants request access to network elements owned by local exchange carriers, the Federal Communications Commission must "consider, at a minimum, whether . . . access to such network elements as are proprietary in nature is *necessary*." 47 U.S.C. § 251(d)(2) (2000) (emphasis added). The Commission ruled that it would consider access to those elements "necessary" even if it could be obtained by entrants from other sources, because "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15642 (1996). The Commission's reasoning surely would have survived scrutiny if the statute required only a rational connection between the

means of access to the local exchange carrier's network elements and the end of successful competition. In *AT & T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), however, the Court applied step 2 of the *Chevron* doctrine[3] to hold that the Commission's interpretation of the term "necessary" was unreasonable because it was "simply not in accord with the [term's] ordinary and fair meaning." 525 U.S. at 390.[4] The Eighth Circuit's interpretation of the term "necessary" in the Necessary and Proper Clause is equally unreasonable as a matter of plain linguistic usage.

2. *The Eighth Circuit's "Rationally Related" Standard for Determining Necessity Ignores the Constitution's Ratification History*

The Eighth Circuit's rational basis standard is inconsistent with the understanding of the Necessary and Proper Clause that was presented to the ratifying public at the founding. During the ratification debates, the Necessary and Proper Clause, which the Antifederalists dubbed the "Sweeping Clause," was a frequent target of attack as a threat to liberty. The Constitution's advocates consistently responded that the Necessary and Proper Clause simply made explicit what would have been implicit in the absence of such a clause. See, e.g., *The Federalist* No. 33, at 202 (Clinton Rossiter ed., 1961) (Alexander Hamilton); *The Federalist* No. 44, at 285 (James Madison); 1 *Annals of Cong.* 1951 (Joseph Gales ed., 1791) (statement of James Madison). The Court has previ-

[3] The *Chevron* doctrine provides that "[i]f the intent of Congress is clear, that is the end of the matter," but "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[4] It is no mean feat for an agency to lose at step 2 of *Chevron*. Indeed, *Iowa Utilities Board* appears to be the first time in the then-fifteen year history of *Chevron* that an agency lost in this Court at step 2.

ously recognized this ratification history and explicitly endorsed the founding view that the Necessary and Proper Clause clarified rather than expanded Congress's executory powers. See *Kinsella v. United States*, 361 U.S. 234, 247 (1960) (holding that the Necessary and Proper Clause is merely "a caveat").

It is therefore instructive to consider what implementing powers Congress could plausibly have claimed in the absence of the Necessary and Proper Clause. Any such implication of power, in a Constitution that is based on the principle of enumerated powers, could only extend as far as (for want of a better word) necessity requires. One could hardly imply a congressional power to pass all laws "rationally related" to the enumerated powers in the absence of the Necessary and Proper Clause. Given the way in which the enumerated Necessary and Proper Clause was presented to the public, one similarly cannot derive such a power from the actual clause. The words "necessary and proper" limit rather than expand Congress's power.

3. *The Eighth Circuit's "Rationally Related" Standard for Determining Necessity Misreads* McCulloch v. Maryland

It is received wisdom among both lower courts and commentators that the Necessary and Proper Clause requires only rational basis scrutiny of Congress's choice of means. See, e.g., *United States v. Edgar*, 304 F.3d 1320, 1325-26 (11th Cir. 2002); *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998); Laurence H. Tribe, *American Constitutional Law* § 5-3, at 805 (3d ed. 2000). Evidence for that position, however, is not readily found in *McCulloch v. Maryland*.

The Court in *McCulloch* considered whether Congress had power to incorporate a bank as a means "necessary and proper for carrying into Execution" various enumerated fiscal powers of the federal government. In upholding the

constitutionality of the bank statute, Chief Justice Marshall rejected the idea that "necessary" laws must be indispensable and instead articulated the now-standard formulation of the meaning of the Necessary and Proper Clause:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

17 U.S. (4 Wheat.) at 421. A requirement that a law be "appropriate" and "plainly adapted" to a permissible end and "consist with the letter and spirit of the constitution" is hardly an endorsement of a rational basis test. To the contrary, a law that is "plainly adapted" to an end is a law that has more than a remote, hypothetical relationship to the desired end. Otherwise, the adaptation would not be "plain[]."

The Court's application of that standard to the question before it in *McCulloch* demonstrates that more than a rational basis test was at work in 1819:

> If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, *if required for its fiscal operations*. To use one, must be within the discretion of congress, *if it be an appropriate mode of executing the powers of government*. That it is a convenient, a useful, *and essential* instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its *importance and necessity*; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the *universal conviction of the utility* of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the *importance* of this instrument, as a means to effect the legitimate objects of the government.

17 U.S. (4 Wheat.) at 422-23 (emphasis added). The emphasized language demonstrates that the Court perceived significantly more than a rational connection between the bank and governmental ends. One can perhaps fault the Court for taking judicial notice of contested facts about the importance of a national bank, but given the thirty-year history of the bank struggle up to that point, the Court's shorthand reference to that history is perhaps understandable. In no event do either the Court's formulation of the appropriate test for necessity or its application of that test point to a rational basis standard.

There is, of course, some other language in *McCulloch* that may suggest a looser means-ends standard. See, e.g., *id.* at 413-14 ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable"); *id.* at 415 (stating that federal powers could not be beneficially executed "by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end . . . . To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."). All of these statements, however, were offered in direct contrast to the position advanced by the State of Maryland; the primary point in each case was that a strict

view of necessity as indispensability is wrong, not that any asserted relationship will suffice. And any such expressions are swamped by the Court's more careful articulation and application of the governing standard.

Fairly considered, *McCulloch* represents a generous view of congressional power to determine which laws are "necessary" for executing federal powers, but not the rational basis standard with which it is often (mis)credited.

Subsequent decisions present a mixed picture. Some modern decisions involving economic regulations, for example, endorse a rational basis test, see, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *United States v. Darby*, 341 U.S. 100, 121 (1941), but those decisions are so closely tied to broad views of the commerce power that it is difficult to read them as precedents for the scope of the Necessary and Proper Clause; the Commerce Clause, rather than the Necessary and Proper Clause, appears to have been doing most of the hard work in those cases. Recent decisions have warned against overgeneralizing the implications of these decisions for Commerce Clause jurisprudence, see *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995), and the same caution is appropriate for the Necessary and Proper Clause. Decisions applying the enforcement provisions of the Civil War Amendments, which authorize Congress to enforce the substantive provisions of those amendments through "appropriate legislation," U.S. Const. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2, have sometimes articulated a standard resembling a rational basis test while linking those enforcement provisions to the Necessary and Proper Clause, see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), but it is doubtful whether "rational basis" accurately describes the connection between congressional means and ends required under current

law for enforcement of those amendments. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997). Cases concerning Congress's power to regulate court procedures under the Necessary and Proper Clause hold that Congress may "regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). On the other hand, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1955), the Court held that Congress could not use the Necessary and Proper Clause to extend court martial jurisdiction (which is constitutionally authorized for active servicepersons, see U.S. Const. art. I, § 8, cl. 14) to ex-servicepersons for crimes committed during military service. The Court carefully scrutinized *and rejected* the assertion of a connection between military discipline and extended court martial jurisdiction, applying a test of necessity far stricter than "rationally related." See *id.* at 22-23.

The Court's most recent application of the Necessary and Proper Clause in *Jinks v. Richland County, South Carolina*, 123 S.Ct. 1667 (2003), counsels against assumption of a rational basis test. Section 1367(d) of Title 28 tolls state statutes of limitations while claims over which federal courts have supplemental jurisdiction are pending in federal court (and for at least 30 days after such claims have been dismissed by the federal courts). The South Carolina Supreme Court held that this statute, to the extent that it extends limitations periods against a State's political subdivisions, exceeded Congress's enumerated powers. This Court reversed, finding the statute authorized by the Necessary and Proper Clause. It reached that conclusion, however, only after a very careful analysis of the statute's relation to Congress's powers over the federal courts, which belies any notion that a rational basis test suffices to establish necessity under the Necessary and Proper Clause. See 123 S.Ct. at 1671-72.

In sum, the Court's earliest and most recent explications of the standard for determining when a law is "necessary" under the Necessary and Proper Clause are inconsistent with the Eighth Circuit's "rationally related" standard. In view of the overwhelming textual, structural, and historical case against the Eighth Circuit's reading of the Necessary and Proper Clause, we urge the Court to clarify that a rational basis standard for necessity has no grounding in the Constitution. To the extent that statements in decisions subsequent to *McCulloch* support the rational basis standard, they should be qualified or disavowed.

B. The Word "Necessary" Requires a "Definite Connection" and an "Obvious and Precise Affinity" Between Means and Ends

If the constitutional standard for necessity under the Necessary and Proper Clause is neither indispensability nor a rational relationship, then what is the appropriate standard? For the answer to that question, we turn to James Madison.

Madison shared the concerns of the Court in *McCulloch* about taking too stringent a view of necessity. In his 1791 remarks in Congress opposing the first Bank of the United States, he explained, as described by the reporter:

> Those two words ["necessary" and "proper"] had been, by some, taken in a very limited sense, and were thought only to extend to the passing of such laws as were indispensably necessary to the very existence of the government. He [Madison] was disposed to think that a more liberal construction should be put on them . . . for very few acts of the legislature could be proved essentially necessary to the absolute existence of government.

4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 417 (Jonathan Elliot ed.,

1836). At the same time, he warned against too generous a reading of the means-ends requirement for executory laws:

> The essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed: If instead of *direct and incidental* means, any means could be used, which in the language of the preamble to the bill [constituting the bank], "might be conceived to be conducive to the successful conducting of the finances; or might be conceived to tend to give facility to the obtaining of loans."

1 *Annals of Cong.* 1947-48 (emphasis added).

Nearly three decades after the first debate on the bank bill, Madison succinctly explained how to navigate between the Scylla of indispensability and the Charybdis of rational basis review. "There is," he said in a letter to Spencer Roane in the aftermath of *McCulloch*, "certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character . . . ." Letter of Sept. 2, 1819 to Spencer Roane, *in* 8 *The Writings of James Madison* 447, 451-52 (Gaillard Hunt ed., 1908). That reasonable medium, in the context of the Necessary and Proper Clause, is to require of executory laws "a definite connection between means and ends," *id.* at 448, in which the executory law and the executed power are linked "by some obvious and precise affinity." *Id.*

This standard captures, as well as words can capture it, the nature of the causal connection between legislative means and ends prescribed by the Necessary and Proper Clause. Perhaps the State of Maryland, Thomas Jefferson, et al. overstated their case, as both Madison and Marshall believed, but it is difficult to escape the conclusion that the word "necessary" as used in the Necessary and Proper Clause requires a very substantial means-ends connection, even if that connection does not rise to the level of indispensability. Such a con-

clusion is justified by the Constitution's text, structure, and history.

Textually, Madison's formulation conforms to the ordinary meaning (then and now) of the word "necessary," which is not a term that one would likely use to describe remote and attentuated connections. Structurally, it makes sense of the other uses of the word "necessary" in the Constitution. Under a Madisonian view of "necessary," the phrase "absolutely necessary" in the Imposts Clause of Article I, section 10 means that without congressional consent, States can only tax imports or exports if their inspection laws would otherwise be unenforceable. That is a sensible, and even obvious, interpretation of the Imposts Clause. The word "necessary" also appears in the Recommendation Clause of Article II, which says that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration, such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 2, cl. 3. Given the secondary role of the President in the Constitution's legislative process, and the fact that any laws ultimately enacted under the Necessary and Proper Clause must be "necessary," the Madisonian understanding of "necessary" is an excellent fit with this clause as well. And historically, if there were no Necessary and Proper Clause, one would likely infer something very much like Madison's standard as an implication from the grant of enumerated powers.

The terms used by Madison to describe the means-ends connection required by the Necessary and Proper Clause are, of course, highly abstract and general. That is always true of standards of review, in constitutional law or elsewhere. Standards of review do not dictate outcomes. Instead, they provide frameworks, focus and direct inquiries, and, as Justice Frankfurter put it in one of the Court's most famous decisions on standards of review, "express[] a mood." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

Those functions are not any less crucial to the legal process for being difficult to define precisely. Lawyers and judges understand that it makes a difference whether the standard of review for factfinding is the "clearly erroneous" standard or the "substantial evidence" standard, even if the exact contours of either standard are impossible to describe. See *Dickinson v. Zurko*, 527 U.S. 150, 161-63 (1999). It makes a difference whether exactions imposed as conditions of development must exhibit a rational relationship or a "rough proportionality" to the local harms generated by the development. See *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994). It means something to require governmental classifications to be, not merely rational, but "substantially related to achievement" of important governmental objectives. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). And there is real content to a requirement that laws under the Necessary and Proper Clause exhibit "a definite connection between means and ends" that shows "some obvious and precise affinity" between the enacted law and an underlying governmental power.

The Court's decision last term in *Jinks v. Richland County* exemplifies the proper application of this standard. The Court in *Jinks* carefully identified the relevant means (tolling of the statute of limitations for pending federal claims) and ends (fair and efficient disposition of disputes, which is the essence of the federal courts' case-deciding power under Article III) and found a direct and obvious connection between them. See 123 S.Ct. at 1671-72. Had the Court expressly adopted Madison's understanding of the Necessary and Proper Clause in *Jinks*, it is doubtful whether the Court's discussion of the tolling law's necessity would have differed in the slightest from the actual opinion.

To be sure, as we have shown, there is language in some of this Court's decisions that is hard to square with Madison's view of the Necessary and Proper Clause (though, ironically,

very little of that language comes from *McCulloch*, which prompted some of Madison's most articulate statements about the clause). We urge the Court to take this occasion to clarify that the proper standard for necessity under the Necessary and Proper Clause, as exemplified by the analysis in *Jinks*, is a direct, obvious, and precise relationship between legislative means and constitutionally permissible ends.

C. Section 666(a)(2) Does Not Have a "Definite Connection" to or "Obvious and Precise Affinity" with Any Underlying Governmental Power

Just as one cannot specify in advance all of the means that Congress might try to employ to effectuate federal powers, one cannot specify in advance exactly which fits between means and ends will be unconstitutional. Madison, for instance, may well have been wrong about the application of his own standard to the Bank of the United States.

With respect to Section 666(a)(2), however, the case is easy. The statute criminalizes bribery attempts in connection with any transaction involving $5,000 or more as long as the bribe's intended target is "an agent of an organization or of a State, local or Indian tribal government, or any agency thereof" that receives at least $10,000 in federal assistance within one year of the alleged crime. There is no requirement that the attempted bribe have anything to do with any particular federally funded program. The statute simply polices the honesty of everyone who deals with any recipient of the statutorily-required amount of federal financial assistance. This falls far short of the constitutional requirements of the Necessary and Proper Clause.

Congress could surely penalize misappropriation of federal funds by their recipients. Such a statute would plainly have a "definite connection" to and "obvious and precise affinity" with the underlying federal program. For similar reasons,

Congress could also penalize the acceptance of bribes by recipients of federal funds when the bribes concern the operation of federally-funded programs. Indeed, Congress may be able to penalize such bribes even if they are not shown specifically to affect the disposition of federal funds. See *Salinas v. United States*, 522 U.S. 52 (1997); cf. *Westfall v. United States*, 274 U.S. 256 (1927) (Congress may prohibit bank fraud perpetrated on State banks in the Federal Reserve System without showing that any of the Federal Reserve Banks suffered a specific loss). In this circumstance, the connection between the penal statute and the execution of an underlying federal power is not as definite, obvious, and precise as in the case of the misappropriation of federal funds, but to require the narrowest possible tailoring of implementing statutes would move too far toward the view that "necessary" means "indispensable." Congress can insure the integrity of the programs that it funds through general laws, even if those laws sometimes sweep beyond their central concerns. It is more doubtful whether Congress could prohibit persons who do not themselves receive federal benefits from offering bribes to persons who do receive such benefits, even when the bribes concern the operation of a federally-funded program: it is unclear how a federal program is definitely or obviously affected simply because temptation is placed in the path of federal funding recipients, given that those recipients can always be punished if they yield to the temptation. But Section 666(a)(2) goes far beyond any remotely plausible connection to the execution of federal powers.

Section 666(a)(2), as interpreted by the government and the Eighth Circuit, does not require any showing that the alleged bribery have any connection to any federally funded program. All that must be shown is that the target of the bribe received federal assistance of some kind in the amount of $10,000 and that the attempted bribe concerned a transaction involving at least $5,000. The only possible rationale for reaching this

kind of conduct is that Congress has an interest in ensuring that recipients of federal benefits not face undue temptation in areas of their lives other than the administration of federal benefits, for fear that they might yield in those other areas and subsequently yield with respect to federal funds as well. If that is "necessary . . . for carrying into Execution" federal powers, so would be a statute prohibiting, for example, solicitation of adultery in connection with recipients of federal funds. Section 666(a)(2) does not represent a "definite," "obvious" and "precise" means for carrying federal powers into execution. It is unconstitutional on its face.

III. SECTION 666(a)(2) IS NOT "PROPER FOR CARRYING INTO EXECUTION" ANY FEDERAL POWER

As this Court has repeatedly recognized, even if a statute is "necessary . . . for carrying into Execution" federal powers, it is still beyond Congress's powers under the Necessary and Proper Clause if it is not "proper" for that purpose. See *Jinks v. Richland County*, 123 S.Ct. at 1672; *Alden v. Maine*, 527 U.S. 706, 732-33 (1999); *Printz v. United States*, 521 U.S. 898, 923-24 (1997). On two recent occasions, the Court has held that congressional statutes that violated constitutional principles of federalism were not "proper" means for executing federal powers. See *Alden*; *Printz*. Judge Bye, dissenting below, developed at some length the argument that Section 666(a)(2) is not "proper for carrying into Execution" federal powers. 326 F.3d at 954-57 (Bye, J., dissenting). The panel majority dismissed this argument on the ground that a law can only fail to be "proper" when Congress directly regulates States in violation of constitutional principles of federalism. *Id.* at 949 n.6. Judge Bye was right and the panel majority was wrong: the direct infringement of state sovereignty is not the only way in which a law can be improper under the Necessary and Proper Clause.

A. A Law Can Fail to Be "Proper" If It Contravenes Constitutional Principles of Federalism, Separation of Powers, or Individual Rights

The word "necessary" in the Necessary and Proper Clause regulates the "fit" between means and ends that must be exhibited by executory legislation. The word "proper" serves a different function. A "proper" law, reflecting the principal meaning of the word "proper" identified by Samuel Johnson in 1785,[5] must respect the *peculiar and distinctive jurisdictional arrangements set forth in the Constitution.* More specifically:

> [T]he authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular institution whose powers are carried into execution. In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights.

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297 (1993). Limits imposed by the character of the States as States are one application of this principle, but they hardly exhaust the circumstances under which executory laws can be improper.

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[5] See 2 Samuel Johnson, *Dictionary of the English Language* (1785) ("proper" means "1. Peculiar; not belonging to more; not common").

If Congress sought to direct the outcome of a specific court case, such a statute would not be "proper for carrying into Execution" the federal judicial power. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). If Congress sought to give itself power to remove executive officers by means other than impeachment, such a statute would not be "proper for carrying into Execution" any federal powers. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). In 1790, before ratification of the Fourth Amendment, if Congress had sought to authorize the use of general warrants to enforce the tariff laws, such a statute would not have been "proper for carrying into Execution" the taxing power. See 1 *Annals of Cong.* 438 (1791) (statement of James Madison) (suggesting that in the absence of a bill of rights, Congress might misconstrue its powers under the Necessary and Proper Clause and wrongly enact laws, such as laws providing for general warrants, "which laws in themselves are neither necessary nor proper"). Laws can be improper under the Necessary and Proper Clause without directly regulating the States.

Even if we confine ourselves to considerations of federalism, the Constitution's most basic federal feature is the principle of enumerated power. A statute enacted pursuant to the Necessary and Proper Clause that threatens to unravel that principle is not "proper for carrying into Execution" federal powers. This point was acknowledged by Alexander Hamilton, writing as Publius in *The Federalist*:

> But it may be again asked, Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union? . . . The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that in

> making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?

The Federalist No. 33, at 203-04 (Alexander Hamilton) (emphasis in original). Cf. *Jinks*, 123 S.Ct. at 1672 (expressing concern about connections between means and ends "so attenuated as to undermine the enumeration of powers set forth in Article I, § 8"). One must accordingly ask whether Section 666(a)(2) is consistent with the Constitution's overall distribution of governmental authority.

B. Section 666(a)(2) Is Not "Proper" Because It Extends Congress's Power Beyond Its Proper Sphere

The Necessary and Proper Clause is a vehicle for executing federal powers. It is not a vehicle for circumventing the Constitution's enumeration of Congress's legislative jurisdiction. The Necessary and Proper Clause, of course, is part of that enumerated legislative jurisdiction, and there are accordingly many subjects that Congress can reach by virtue of that clause that otherwise would not be within its power. The power to create federal offices, the power to regulate court procedures, the power to condemn property, and the power to punish offenses other than counterfeiting, maritime offenses, or violations of the law of nations are all powers beyond those enumerated elsewhere in the Constitution that Congress possesses under the Necessary and Proper Clause.

That does not mean, however, that Congress can employ such means in a limitless fashion, even when such means are "necessary" within the meaning of the Necessary and Proper Clause. Congress's regulatory authority is carefully defined by the enumerations of subjects over which Congress is competent. Those enumerations define what might be termed Congress's "subject matter jurisdiction," which can be effectuated by means of laws pursuant to the Necessary and Proper Clause. But a law that is presented as a means for carrying

into execution federal powers that in fact regulates an area beyond the specific enumerations of Congress's regulatory authority is not "proper." It is not a law that is distinctively and peculiarly within the jurisdiction of Congress.

For example, Congress has power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, which includes the power to establish court martial jurisdiction over offenses by military personnel. Historically, there are many circumstances in which Congress has believed it useful to employ the Necessary and Proper Clause to extend court martial jurisdiction to servicepersons who have left the service or to dependents of servicepersons who live on overseas military bases. The Court has consistently rejected use of the Necessary and Proper Clause to expand court martial jurisdiction beyond active servicepersons. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-23 (1955) (no court martial jurisdiction over ex-servicepersons even for crimes committed while in the service); *Reid v. Covert*, 354 U.S. 1, 20-22 (1957) (plurality opinion) (no court martial jurisdiction over civilian dependents for capital crimes); *Kinsella v. United States*, 361 U.S. 234, 247-48 (1960) (unanimous decision) (no court martial jurisdiction over civilian dependents for non-capital crimes). The basic rationale of at least the latter two decisions is that the extension of court martial jurisdiction beyond active servicepersons pursuant to the Necessary and Proper Clause is "inconsistent with both the 'letter and spirit of the constitution,'" *Reid*, 354 U.S. at 22 (quoting *McCulloch*)—that is, the extension is not "proper for carrying into Execution" federal powers. (The Court in *Quarles* focused more on necessity than propriety.) In all of these cases, of course, the Court noted that the consequence of allowing use of the Necessary and Proper Clause to extend court martial jurisdiction would be to authorize prosecution of crimes without the safeguards of Article III and the Fifth and Sixth Amendments. See *Quarles*, 350 U.S. at 15-20; *Reid*,

354 U.S. at 20-21; *Kinsella*, 361 U.S., at 246-47. But anytime the Necessary and Proper Clause is used to expand enumerated federal powers, there are, at a minimum, implications for federalism. Once federalism is acknowledged as a genuine constitutional principle, the concerns that animated the court martial cases are entirely generalizable.

In this vein, Section 666(a)(2) disrupts a "proper" allocation of authority between state and federal authority. Section 666(a)(2) criminalizes the conduct of persons who simply come into contact with recipients of federal funds. That is precisely the kind of general legislative authority that Congress is denied by the enumerations of legislative competence in Article I, section 8. It is precisely the kind of authority that it is not "proper" for Congress to exercise when executing federal powers.

CONCLUSION

Section 666(a)(2) is neither necessary nor proper for carrying into execution any federal power. Accordingly, *amicus curiae* Cato Institute requests that this Court declare Section 666(a)(2) invalid and reverse the decision of the court below.

Respectfully submitted,

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In The Supreme Court of the United States

BASIM OMAR SABRI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") submits this Brief *Amicus Curiae* brief in support of the Petitioner in this case, Basim Omar Sabri.[1] NACDL is a nonprofit corporation with more than 10,000 lawyer-members and 28,000 affiliate-members in all 50 States. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice and to ensuring that criminal statutes are in accord with the United States Constitution. In furtherance of this and its other objectives,[2] NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

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[1] The parties have consented to the submission of this Brief *Amicus Curiae*, and their letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus curiae*, its members, or its counsel contributed money or services to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

[2] More information about the NACDL, its work, and its mission is available at http://www.nacdl.org.

STATEMENT OF THE CASE

The relevant facts of this case, its procedural history, and the fundamental principles of federalism and how they apply to 18 U.S.C. §666 are amply set forth in Mr. Sabri's Brief. This Brief *Amicus Curiae* will address, through the works of commentators on the subject and the caselaw, the dangerous breadth of §666(a)(2), and how it threatens the foundation of federalism.

SUMMARY OF THE ARGUMENT

This case considers the constitutional validity of a relatively novel but increasingly employed federal criminal statute, 18 U.S.C. § 666,[3] that has engendered fierce debate about some of the "oldest questions" of constitutional law. *See New York v. United States*, 505 U.S. 144, 149 (1992) ("[t]he constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States").

Indeed, the division among the courts – in this case, for example, between the District Court and the Court of Appeals, and even within the appellate panel itself – regarding a question so fundamental as Congress's authority

[3] Section 666 is sometimes characterized as "the Beast in the Federal Criminal Arsenal" or "the Stealth Statute." *See* George D. Brown, *Stealth Statute: Corruption, The Spending Power, and the Rise of Section 666*, 73 NOTRE DAME L. REV. 247 (1998); Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990).

to enact particular legislation is nothing less than extraordinary.

Certainly the stakes are sufficiently important to warrant such controversy. The issue at the heart of this case is, in the words of one District Court, "how far Congress has gone, and, under the Constitution, may go, to federalize crime."[4] It is a fundamental principle of constitutional law that the federal government lacks a general police power. Therefore, there are real and enforceable limits on Congress's ability to use its Spending Power to create, prosecute, and punish federal crimes.

Section 666(a)(2) exceeds those limits, and federal prosecutors' burgeoning use of the statute in "garden-variety" local corruption cases threatens to undermine the tenets of federalism, creating federal criminal jurisdiction in matters traditionally, and constitutionally, left for the states to proscribe and punish. Neither Congress's Spending Power, nor the Necessary and Proper Clause (the "Sweeping" clause), provide authority for such a federal arrogation of law enforcement power at the expense of the states.

Left unchecked, this authority, and federal criminal jurisdiction, will eclipse state criminal law enforcement to an unwarranted degree, and, in the course of exceeding Congress' enumerated powers, also usurp those the Tenth Amendment leaves to state and local governments.

[4] *United States v. McCormack*, 31 F. Supp. 2d 176, 177 (D. Mass. 1998).

Affirmance of the decision below, which would permit the exercise of federal jurisdiction under §666 (a)(2) absent any nexus between the offense conduct and integrity of the federal program at issue, or the funds provided to state and local governments and agencies, would effectively "federalize" the entirety of criminal common law, and erase any restraints on Congress's ability to regulate criminal conduct heretofore reserved for the states.

Accordingly, in Judge Bye's words, "the law is unconstitutional, void *ab initio*." *United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., *concurring*) ("Congress may not pass laws unless it acts pursuant to an express grant of power or authority in Article I of the Constitution. Section 666 cannot properly be linked to any grant of Congressional power in the Constitution. Hence, Congress exceeded its proper authority in enacting §666").

ARGUMENT

SECTION 666(a)(2) EXCEEDS CONGRESS'S AUTHORITY, AND VIOLATES THE TENTH AMENDMENT

Section 666 has developed into an increasingly deployed weapon in federal prosecutors' anti-corruption arsenal.[5] As Professor Brown reports, in a just-published

[5] By 1990, there were only nine published opinions discussing the provision. Since then, use of the statute has increased dramatically. *See* Rosenstein, *The Beast in the Federal Arsenal*, *supra*, at 690 & n. 152.

study:

> [p]rosecuting state and local corruption is an important activity of the Department of Justice. Between 1981 and 2000, 1,704 state officials were indicted on corruption offenses, 1,462 were convicted, and 554 were awaiting trial at the end of 2000. The twenty-year totals for local officials were as follows: 4,968 were indicted, 4,233 were convicted, and 1,735 were awaiting trial as of the end of the year.[6]

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Commenting particularly on §666, Professor Brown notes that "[t]his surprisingly little-known statute is on the way to becoming a favorite tool of federal prosecutors dealing with state and local corruption."[7] Thus, the Question Presented in this case, and the constitutional arguments it involves, are all the more significant in light of the dangers that the federalization of crime poses to the administration of federal criminal justice and to "first principles" of constitutional federalism.[8]

[6] George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 421 (2003).

[7] *Id.* at 504.

[8] *See generally* Chief Justice William H. Rehnquist, *Report to Congress* (Jan. 1, 1999) (noting that the over-federalization of crime "threatens to change entirely the nature of our federal

In that context, the American Bar Association has called for a "principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization." ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, at 56 (1998). The ABA Task Force included among the "detrimental long-term effects of unwarranted federal intrusions[,]" the position that such federalization "generally undermines the state-federal

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system"). Indeed, even a brief survey of the reported cases involving §666 prosecutions reveals that the statute threatens the federal-state balance that is particularly important in the criminal law context, and has often reached "garden-variety" local corruption where there is no meaningful connection to a federal interest. *See, e.g., United States v. Grossi*, 143 F.3d 348 (7th Cir. 1998) (town supervisor demanded and received bribes for, *e.g.*, administering local general-assistance program funds to compensate doctors for unpaid bills); *United States v. DeLaurentis*, 230 F.3d 659 (3rd Cir. 2000) (supervisor of police detectives, in return for bribes, interceded with town council to keep a bar open, thereby necessitating disproportionate allocation of police manpower to the detriment of street patrols elsewhere); *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989) (contractor sold pipe to counties and gave kickbacks to county officials who granted contracts); *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993) (county executive received bribes in connection with civic-center project and automobile purchases); *United States v. Lipscomb*, 299 F.3d 303 (5th Cir. 2002) (city council member accepted bribes from taxicab company owner); *United States v. Ferrara* 990 F.Supp. 146 (E.D.N.Y. 1998) (defendant charged with bribing town board in exchange for change in zoning to allow construction of radio tower); *United States v. Smith*, 659 F.Supp. 833 (S.D.Miss. 1987) (county supervisor charged with accepting bribes in connection with purchase of culverts and grader blades).

fabric and disrupts the important constitutional balance of federal and state systems[.]" *Id.*, at 50.

In addition, the ABA Task Force reported a negative impact on the federal courts as well: "[n]early all of those who have examined the impact of federalization have concluded that the federal courts are being overburdened with cases traditionally handled in state courts." *Id.*, at 38. Nor did it matter whether federal enforcement was sporadic, since the Task Force concluded that "inappropriately federalized crime causes serious problems to the administration of justice in this country. Even when prosecuted only occasionally, inappropriately federalized crimes threaten fundamental allocations of responsibility between state and federal authorities." *Id.*, at 50.

As the court below observed, "it is axiomatic that '[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.' *United States v. Morrison,* 529 U.S. 598, 607 (2000)." *United States v. Sabri,* 326 F.3d 937 (8th Cir. 2003). Accordingly, courts and commentators have frequently observed that the constitutional authorization for §666 is Congress's "Spending Power" – *i.e.*, its power to "provide for the . . . general Welfare of the United States."[9]

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[9] U.S. CONST. art. I, § 8, cl. 1. *See, e.g., Fischer,* 529 U.S. at 689 n.3 ("Section 666 was adopted pursuant to Congress' Spending Power, Art. I, § 8, cl. 1.") (Thomas, J., dissenting); *United States v. Phillips*, 219 F.3d 404, 414 (5th Cir. 2000) ("Congress' authority to enact Section 666 rests on the Spending Clause of the Constitution."); *United States v. Morgan*, 230 F.3d 1067, 1073 (8th

However, it is not at all clear, how, whether, and to what extent the Spending Power authorizes the creation, prosecution, and punishment of federal crimes. As Professor Engdahl has (colorfully) put it:

> [f]unds recipients are not protectorates of the federal government[.] . . . The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog. Money cannot infect the recipient with the germ of generalized federal governing control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property.[10]

This Court has not yet had occasion to consider the applicability of *South Dakota v. Dole*, 483 U.S. 203 (1987), and its conditional-spending progeny to a challenge to the constitutional validity of a federal criminal statute. It would

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Cir. 2000) (Bye, J., concurring) ("Every court that has addressed the issue has concluded that Congress adopted Section 666 pursuant to its Spending Clause power."); *United States v. McCormack*, 31 F. Supp. 2d 176, 186 n.18 (D. Mass. 1998) ("Courts have held that section 666 was passed pursuant to Congress' tax and spending power as set forth in Article I, Section 8."); Brown, *Stealth Statute, supra*, at 262; David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 92 (1994) (asserting that §666 and similar provisions "lack any basis in the Constitution" and that "Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else").

[10] Engdahl, *The Spending Power*, 44 DUKE L.J. at 92.

seem, though – given "first principles" of federalism and the restrictions on conditional spending set out in *Dole*, 483 U.S. at 206-208 – that, as the Court below recognized, §666(a)(2) cannot be justified under the conditional-spending doctrine.

The Spending Clause "confers only a power to spend; it confers no independent power to regulate." Tribe, *American Constitutional Law*, § 5-10, p. 322 (2d ed. 1988) [*citing United States v. Butler*, 297 U.S. 1, 62-78 (1936)]; *see also Linder v. United States*, 268 U.S. 5, 17-18 (1925). Bribery offense involving local officials and local agencies, and local subject matters, is a matter of basic criminal law enforcement under a general police power, an area in which, as this Court pointed out in *United States v. Lopez*, 514 U.S. 549, 561 n. 3 (1995), "the States possess primary authority."

Congress is no doubt constitutionally permitted to protect federal funds it provides to local communities by authorizing federal prosecution for misappropriations of those funds. Congress, however, is not free to authorize the government to prosecute local criminal conduct that does not implicate any federal interest or the funds provided, as §666 permits the government to do here. *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) (while spending power permits Congress to restrict local entity's use of federal grant monies, Congress may not regulate activities undertaken with the organization's own funds).

Because §666 does not merely impose conditions on the receipt of federal funding, *South Dakota v. Dole* fails to

provide authority for the exercise of federal criminal jurisdiction in this case. Unlike the statute in *Dole*, which withheld a portion of federal highway funds from states refusing to raise their minimum drinking age to 21, §666 does not operate directly against the federally funded entity, but on any person whose actions affect such an entity.

The statute upheld in *Dole* would have more closely resembled §666 had it authorized federal prosecution of drunk teenagers caught speeding on a back country road on the theory that they are also likely to travel on a highway constructed with federal funds during some point in their travels. It is respectfully submitted that in light of this Court's continuing sensitivity to federal encroachment on state law enforcement prerogatives, such an exercise of Congressional power under the Spending Clause would not be endorsed by this Court.[11]

Even when a federal statute only imposes conditions on a grant of federal funding, the condition "must . . . bear some relationship to the purpose of the federal spending. . . ; otherwise . . . the spending power could render academic the Constitution's other grants and limits of federal

[11] If §666 imposes a "condition" on federal funding, it is coercive, unlike the condition imposed in *Dole*. Under §666, to avoid the scrutiny of its financial affairs by federal prosecutors, a local entity would have to forego all but $10,000 per year in federal funding, as opposed to the "5% of the funds otherwise obtainable under specified highway grant programs" South Dakota would have been required to give up in order to keep its drinking age at 19. 483 U.S. at 211.

authority." *New York v. United States*, 505 U.S. at 167.[12]

When Congress seeks to impose criminal liability, and not merely impose conditions, the Constitution undoubtedly requires that the relationship between the activity Congress seeks to regulate and the purpose of the particular federal expenditure relied on to justify the regulation be more direct.

This Court's opinion in *Salinas v. United States*, 522 U.S. 52 (1997), is perfectly consistent with this view. In *Salinas*, this Court found that the prosecution of a local sheriff, whose facility housed federal prisoners under a government contract, for accepting bribes from a federal prisoner to allow conjugal visits was a proper exercise of federal power because the defendant's preferential treatment "was a threat to the integrity and proper operation of the federal program." 522 U.S. at 61.

Thus, *Salinas* found a connection between the regulated activity (a local sheriff's receipt of bribe from a federal prisoner in his custody pursuant to a federal contract) and the purpose of the expenditure of federal funds which created federal jurisdiction (housing federal prisoners).

[12] *See also Dole*, 483 U.S. at 208 (upholding minimum drinking age legislation where "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended – safe interstate travel"); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (condition on federal funding must be "relevant to federal interest in the [federally funded] project").

In the absence of such a link, the spending power would render the rest of Article I superfluous. *New York v. United States*, 505 U.S. at 167. Since virtually any local crime will have some effect on a federally funded entity (for example, all fifty states receive federal money for ubiquitous purposes like highways, law enforcement, and health care), permitting federal prosecutions of conduct unconnected to the federal benefits or the federally funded program would "bid fair to convert congressional authority under the [Spending] Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

That observation appears to signal that this Court does not intend to take any further "steps down that road." *Id.*. *See also* Brown, *Should Federalism Shield Corruption? – Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 268, 271 (predicting the Court's continuing vindication of state and local prerogatives under principles of federalism).

In that context, the leading academic authority on §666 has expressed serious concerns about the statute's impact on federalism, cautioning that "[t]aken to its limits, the combination of the spending power with the Necessary and Proper Clause could exceed" constitutional limits.[13]

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[13] Brown, *New Federalism's Unanswered Question*, *supra*, at 510. Another commentator, one of the authors of this Brief *Amicus Curiae*, advances in a recent law review article the argument that the Necessary and Proper Clause does not provide a sufficient constitutional basis for §666. *See* Richard W. Garnett, *Federal Criminal Law, the Spending Power, and the New Federalism*, 89

Other commentators have also questioned such a basis for federal regulatory authority, noting that it would be "strange if a 'proper' executory law – a law that is distinctively and peculiarly within the jurisdiction of the national government – could regulate subjects outside the careful, precise enumeration of regulable subjects found elsewhere in the Constitution."[14]

CORNELL L. REV. 1 (2003).

It should also be noted that there is a rich, provocative, and growing literature devoted to the Necessary and Proper Clause, and that several leading scholars have contended that the Necessary and Proper Clause, correctly understood, imposes more demanding obligations on federal legislators than is sometimes supposed. *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Randy E. Barnett, *The Original Meaning of the Necessary & Proper Clause*, 6 U. PA. J. CONST. L. _____ (forthcoming 2003); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581 (2002); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107 (1998); Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267 (1993). James Madison famously reminded us that "[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress." 2 ANNALS OF CONG. 1898 (1791).

[14] Lawson & Granger, *Jurisdictional Interpretation*, *supra*, at 331; *see also, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1234 (1994) ("[T]he Necessary and Proper Clause, which the founding generation called the Sweeping Clause, [does not] grant general legislative powers to the national government.").

As former Chief Judge Richard S. Arnold has observed, "[o]ur Constitution is a charter for a federal government of limited powers, and under this charter the States possess primary authority for defining and enforcing the criminal law." *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1996) (internal quotation marks and citation omitted).

In the same spirit, this Court has in recent years, in *Morrison* and *Lopez*, identified and enforced constitutional limits on Congress' power to expand federal regulatory power and jurisdiction. *Cf. McNally v. United States*, 483 U.S. 350, 360 (1987) (refusing to construe the then-existing mail fraud statute, 18 U.S.C. §1341, "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials").

It is respectfully submitted that such vigilance is necessary and appropriate with respect to §666(a)(2) as well. While Article I of the Constitution grants Congress an expansive, sweeping power to promote the "general Welfare of the United States," the Constitution also imposes on that authority meaningful limits that protect individual liberty in criminal cases by constraining government no less than do the Fourth, Fifth, and Sixth Amendments.

Those prosecuted under §666 are not Congress's contracting partners for purposes of conditional-spending doctrine; nor are §666 prosecutions of corrupt individuals by the United States obligations to which the recipients of

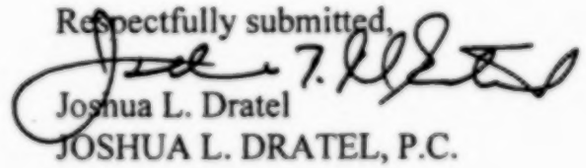
federal-program funds could possibly be said to have agreed. The Sweeping Clause's occasional role as a constitutional catch-all cannot, consistent with "first principles" of constitutional law, sustain the argument that the effectively unlimited scope of §666(a)(2) is valid as "necessary and proper" to the smooth functioning of federal programs aimed at promoting the General Welfare.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that 18 U.S.C. §666(a)(2), in reaching conduct lacking a nexus to a federal interest exceeds Congress's authority, and violates the Tenth Amendment. As a result, §666(a)(2) is unconstitutional on its face, and the judgment below in this case should be reversed.

Dated: 26 November 2003
New York, New York

Respectfully submitted,



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